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1048
No. 2903

United States Circuit
Court of Appeals

FOR THE NINTH CIRCUIT

JOHN GILL, for whom has been substituted Maurice
McMicken, Administrator with the will annexed
of John Gill, Deceased,

Plaintiff in Error,

vs.

FRANK WATERHOUSE,

Defendant in Error

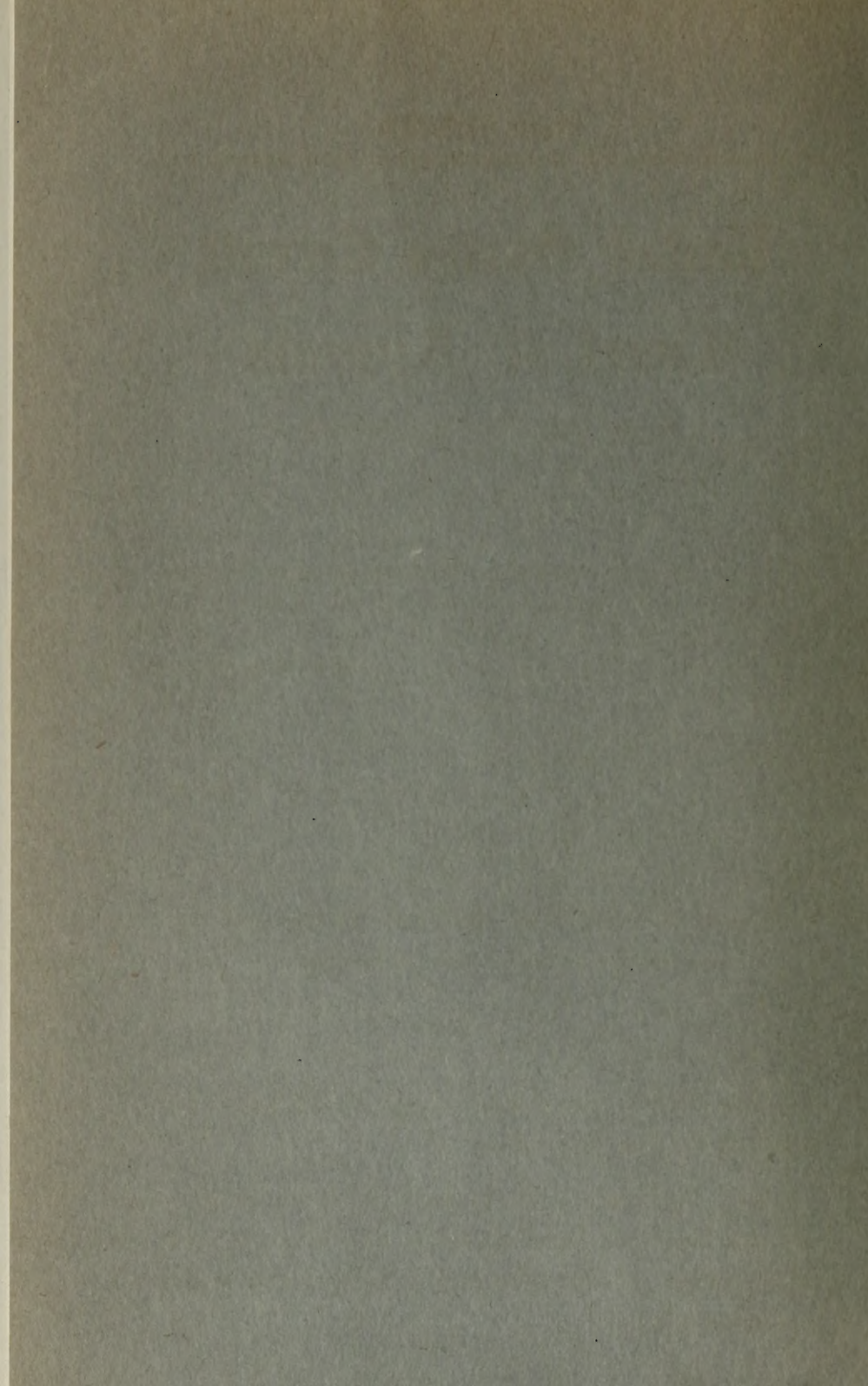
SUPPLEMENTAL REPLY BRIEF OF
DEFENDANT IN ERROR.

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The motion for nonsuit in the Court below was
based upon four grounds:

(1) Failure of the plaintiff in error to prove
that the bank had signified to the defendant in error
its acceptance of his offered letter of guaranty within
a reasonable time;

(2) That the debt owing to the bank by the English corporation had been paid;

(3) That the debt of the bank against the English corporation was barred by the statute of limitations, and as the guaranty of the defendant in error is a collateral security for that debt, no right of action on the guaranty can be maintained after the right of action of the creditor against the principal debtor had become barred; and,

(4) There was no proper proof offered of the indebtedness of the English corporation to the bank.

In the original brief filed by the plaintiff in error herein, he discussed only the first two of these propositions; but his reply brief, recently filed since the argument by permission of the Court, contains a discussion and citation of authorities upon the two last propositions and some new contentions as to the other propositions. As we have heretofore had no opportunity to reply to the arguments and authorities thus presented by the plaintiff in error in this reply brief, we are venturing to ask the Court to permit us to file this supplemental brief.

I

NOTICE OF ACCEPTANCE OF GUARANTY

Plaintiff in error concedes that notice of acceptance must ordinarily be seasonably given to the

guarantor, in order to complete the contract, but insists that this is not required "in respect to guaranties which in terms are absolute and unconditional." This contention is fully met by *Davis Sew. Mch. Co. v. Richards*, 115 U. S. 524. In that case, as in the case at bar, the guaranty was absolute and unconditional; in that case, as in the case at bar, the person guaranteed did, in fact, accept the guaranty and extended the credit contemplated to the debtor; in that case, the first notice given to the guarantor that his guaranty was accepted was given three years later, when demand of payment was made of the guarantor, while in the case at bar the guaranty was executed in 1899, and the first notice given to defendant that his guaranty had been accepted by the bank was in October, 1906, when demand of payment was made. In that case the Supreme Court held, as did the trial court in the case at bar, that the guarantor could not be held on the guaranty because not seasonably notified of its acceptance.

Plaintiff in error refers to the sixth affirmative defense, without, however, pointing out its relevancy to this proposition. The defense avers acceptance of the guaranty in connection with other guaranties, but it does not show that the defendant was seasonably notified of the acceptance by the bank.

II

PAYMENT

This question was discussed by plaintiff in error in his original brief and by us in our answering brief. We do not intend to enter into a new discussion of this subject, but wish to call the attention of the Court to the quotations made by plaintiff in error, on page 7 of his brief, from the testimony of the witness Gill. The quotation begins in the middle of a sentence with the following words: "the Bank were desirous that the debt, etc." What the witness really said was as follows, the part omitted by plaintiff in error being in italics:

"I have no direct personal knowledge of the initiation of the transaction between the late John Gill and the Commercial Bank of Scotland, Ltd., but my understanding is that the bank were desirous that the debt due by Frank Waterhouse, Ltd., should be repaid and that Mr. Alexander McNab, who was one of the guarantors and who was not, I understand, in a position to meet the guarantee if it were enforced against him, approached the late John Gill as a friend and asked him to take over the debt; that the late John Gill agreed to do so, and paid off the debt, which amounted to £22,897:16:5, and obtained the assignation before mentioned by the Commercial Bank of Scotland, Ltd., in favor of himself as an individual, in consideration of said payment by him to the bank, and that the payment was made by cheque or cheques by the late John Gill. I have not been able to find the cheque or cheques among the late John Gill's papers."

Manifestly, the statement of this witness cannot be taken as evidence of any agreement on the part of Gill and the Bank that the payment made by Gill to the Bank should be considered as a purchase and not a payment of the debt. In the first place, the witness distinctly states that he has no personal knowledge of the matter whatever, and what he states is merely his understanding of the transaction obtained from other sources without personal knowledge. Furthermore, while he states that it was the understanding that McNab asked Gill "to take over the debt," he further states that Gill "paid off the debt." The phrase "take over the debt" is certainly no more significant than the phrase "paid off the debt," particularly in view of the further statement of his understanding that the Bank had demanded payment of the debt, and of the fact that the Bank's books entered the payment as a payment of the debt, not a purchase, and that no assignment of the debt was ever made by the Bank.

Reference is also made in this connection to the testimony of Anderson, on page 32 of the Record. Witness Anderson, as shown in our answering brief, stated that he had no connection with this transaction, nor any personal knowledge thereof. His testimony upon that point was, therefore, excluded by the Court below.

Plaintiff in error also claims that the execution of the assignment of the guaranty in suit, although made eight months after the payment, is evidence of an agreement made at the time of the payment that the assignment would subsequently be executed. When all of the circumstances are considered, we think the inference is quite otherwise. Plaintiff says:

"If the transaction was a purchase, the guaranties followed the debt and the mere delivery was sufficient to authorize the holder to sue thereon in the Courts of Great Britain."

If the debt had been purchased and assigned by the Bank to Gill, it may be that the guaranties would follow as an incident of the principal thing, the debt, and it may be that under the English law the assignee of the debt would be entitled to sue on the guaranties in his own name; but in this case the debt was never assigned. The assignment was of one of the six letters of guaranty. Therefore, Gill was never in a position to demand of or sue the English corporation upon the debt. He could not sue in his own name because the debt was not assigned to him. He could not sue in the name of the Bank because the assignment in evidence expressly provides:

"PROVIDED ALWAYS that it shall not be competent to the said John Gill or his foresaids to use our name or instance in any action or steps of procedure to follow hereon."

(Record, p. 92).

The failure to assign the debt, and the express provision that Gill should not use the name of the Bank in any suit or action is very persuasive, if not conclusive, evidence that it was not the intention of the Bank to clothe Gill with any rights whatever with respect to the debt of the English corporation to the Bank. If Gill paid the debt, at the instance and for the benefit of McNab, one of the co-guarantors, we can readily understand why Gill and McNab might subsequently request the Bank to assign the guaranty of the defendant in order to aid McNab, or Gill as his representative, in recovery by way of contribution from the defendant as a co-guarantor. The assignment of the guaranty under those conditions would be intelligible and consistent with the rights of the parties. The assignment of the guaranty, however, without the debt, and the insertion of the clause in the assignment that the name of the Bank should not be used in any proceedings brought by the assignee, thereby making it impossible for the assignee to sue for the recovery of the principal debt, is entirely inconsistent with the theory that Gill purchased and intended to become the owner of the debt. If there is any inference to be drawn from the execution of this assignment in the form in which we find it, that inference is that the payment by Gill was intended to extinguish the debt of the Bank, and the assignment of the guaranty subsequently was intended to aid

him as the representative of the other guarantors in enforcing contribution against this defendant as a co-guarantor. The present action, however, is not a suit for contribution.

III

RELEASE OF PRINCIPAL DEBTOR RELEASES GUARANTOR

1. The record shows that the creditor bank and the principal debtor, the English corporation, were both corporations organized and located in England. The debt was evidenced by an open account, and more than four years elapsed between the date of the last item on the account and the commencement of the action in this case. The right of action of the Bank against the principal debtor on this account was barred by the three-year statute of limitations, cited in our original brief, if the law of the forum applies. If the law of England is, or is presumed to be, the same as the law of the forum so far as it affects the remedy, then the right of action as against the principal debtor was barred in England, and by §178 R. & B. Code of Washington, it was barred here.

The fifth affirmative defense of the defendant set up the defense that the right of action of the creditor against the principal debtor being barred, no action could be maintained against this defendant, the guarantor. The law of England, where the creditor and

principal debtor resided, was neither alleged nor proven by either party in this case. The theory of the defendant in error is that in the absence of any evidence as to the law of a foreign country, the rule established by the state courts must be followed by the Federal courts as to the statute of limitations and other matters relating to the remedy; and that the rule of decision established in the state courts of Washington is that the Court will presume that the foreign law is the same as that of the forum; while the contention of the plaintiff in error, as advanced in its reply brief, is that it devolved upon the defendant to plead and prove the foreign law. (Reply Brief, p. 13).

The rule is well settled in the State of Washington that in an action in its courts based upon a cause of action arising in a foreign country, or where the rights of the parties depend upon the law of a foreign country, and there is no proof of such foreign laws, the Court will determine the cause according to the laws of the State of Washington, it being presumed in the absence of any pleading or evidence to the contrary that foreign laws are the same as the laws of the forum.

Pitt v. Little, 58 Wash. 355,
Gunderson v. Gunderson, 25 Wash. 459.

This presumption prevails in the State of Wash-

ington with respect to both the common law and the statutory law of the foreign country and it has become a settled rule of decision in that state. It is further the rule in that state that if either party is relying upon the laws of a foreign country and those laws are claimed to be different from the laws of the State of Washington, then the party asserting such rights under the foreign law must plead or prove the foreign law.

(Same authorities).

In Jones on Evidence, Section 84, the general rule is stated as follows:

“Wharton says that with regard to what may be called processual presumption, of which the presumption that a foreign law is the same as the domestic is one, no doubt the *lex fori* decides. (Citing Wharton on Conflict of Laws, §782). But it amounts to the same thing whether you say that, in the absence of proof, the Court will presume the foreign law to be like the domestic law, or that the Court will proceed according to the domestic law. It must always be remembered that the courts do not take judicial notice of foreign laws, no matter whether they be written or unwritten. They must be proved like any other fact. The general rule is that in order to obtain the benefit of the law of a foreign country, it must be pleaded and proved. And in the absence of proof to the contrary, the rights of the parties will be adjudicated by the law of the forum. Where the rights of litigants are to be determined in this country, although those rights might be affected by proof of the law of a *foreign* country where the contract was made or the right

accrued, in the absence of any such proof the law of the forum must furnish the rule of decision."

The presumption that the foreign law is the same as the law of the forum is, of course, a presumption of fact and is a rule of evidence. Under Sections 721 and 914 U. S. Rev. Stat., this rule of decision or rule of evidence established by the state courts controls in a Federal court sitting in the State of Washington, in so far as it relates to the statutes of limitations or otherwise relates to the remedy.

Nashua Sug's. Bank v. Anglo-American Land Co., 189 U. S. 221. This case is illuminating. In order to establish its case, the plaintiff was required to prove certain statutes of England, and the trial court admitted the deposition of an English solicitor in proof of the statutes. The objection was made that, under *Church v. Hubbert*, 2 Cranch 187, 238, the statutes could be proved in the Federal Courts only by production of duly exemplified copies. The Court said, in disposing of this objection, that the state courts of New Hampshire permitted proof of foreign statutes by witnesses acquainted with them producing copies without exemplifications, and that "the circuit court of the United States sitting in New Hampshire may, under Revised Statutes, Sec. 721, declaring that 'the laws of the several states,' with certain exceptions, 'shall be regarded as rules of decision in trials at common law in the courts of the United States,' receive such evidence

of the authentication of foreign statutes as the practice of the courts in that state may authorize and justify. *McNeil v. Holbrook*, 12 Pat., 89; *Conn. Mut. L. Ins. Co. v. Union Tr. Co.*, 112 U. S. 255; *Vance v. Campbell*, 1 Black 427. The laws of the several states with respect to evidence within the meaning of this section apply, not only to the statutes, but to the decisions of their highest courts."

In *McNeil v. Holbrook*, *supra*, the Court held that a Federal Court sitting in Georgia was bound by a state statute declaring, as a rule of evidence, that in actions by an assignor or indorser of a bill or note, the assignment or indorsement, without regard to its form, should be sufficient evidence of the transfer and of the genuineness of the handwriting.

In *Sims v. Hundley*, 6 How. (N. S.) 1, a notary's certificate, while inadmissible under the principles of general law, was competent evidence in a Federal Court sitting in Mississippi, whose statute made it competent evidence of certain facts.

And in *Bucher v. Railroad Company*, 125 U. S. 555, the Court says:

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title

and possession thereto, they are to be treated as laws of that state by the Federal courts.

"The principle also applies to the rules of evidence."

In *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, the Court held that the Federal Courts in the state in which there was no statute and no practice with respect to the matter, had no authority to require the plaintiff to submit to a physical examination by the experts of the defendant. But in *Camden v. Stetson*, 177 U. S. 172, the Court held that where there was a state statute authorizing the Court to require the plaintiff to submit to such physical examination, the Federal Court sitting in that state was clothed with the powers conferred by that statute, it relating to rules of evidence.

We submit, therefore, that these cases establish, (1) that by the established rule of decision or rule of evidence of the state courts the law of a foreign country, in the absence of any other evidence, is presumed in fact to be the same as the law of the state: (2) that this rule of the state courts controls the Federal Courts sitting in this state, under the provisions of §§721 and 914 Revised Statutes, where the question involves the remedy and procedure, and not matters of substantial rights.

The State Courts held, in substance, that a cause of action accruing in a foreign country will be pre-

sumed to be barred by the lapse of the period of time which would bar it if it had accrued in this state, in the absence of proof of a different period of prescription in the foreign country. If this rule was embodied in a state statute, Federal Courts sitting in this state, would follow the statute, under Section 721 U. S. Rev. St. In the Nashua Savings Bank case, *supra*, the Court held that the term "laws" as used in Section 721 applied to state decisions as well as to state statutes, with respect to evidence, and it would seem to logically follow that evidentiary presumptions with respect to matters controlled by the law of the forum, such as limitations of action, when they become established by the decisions of the state courts, become a part of the laws of the state, and as such control all actions brought in the state. The proposition might be stated in a different form. By the statutes of Washington open accounts are barred in three years, and by Section 178, R. & B. Code, debts barred in a foreign country are barred when sued on here. By the decisions of the Supreme Court of Washington, an open account between residents of a foreign country, and outstanding for more than three years, will be presumed to be barred by these statutes and no recovery will be permitted thereon in our courts unless the party seeking such recovery shows affirmatively some fact removing or preventing the bar. That fact may be a provision of the foreign law, or some act of the

debtor, but in either case, the fact relied upon must be proven—otherwise a recovery will be denied by virtue of Section 178 R. & B. Code.

Now, this course of decisions in the state courts, construing and applying these statutes and establishing a rule of evidence in their application, is controlling upon the Federal Courts sitting in this state and administering these same statutes, under Sections 721 and 914 Rev. Statutes.

The cases cited by Plaintiff in error did not involve matters affecting the remedy, nor was there any rule of evidence established in the state courts either by state statute or local decisions. Whether a liability, once existing, is still subsisting and enforceable, notwithstanding the lapse of time, is a question of local law relating to the remedy.

Under the doctrine in the Prescott case the plaintiff seeking to recover on a collateral undertaking was required to prove,

(a) The collateral undertaking of defendant; and,

(b) An *existing* liability of the principal debtor at the time the action was commenced. Having failed to prove an existing liability of the principal debtor at the time the action was commenced, the action fails.

2. Plaintiff in error, however, contends that even assuming the correctness of our position on this point, the rule does not prevent the maintenance of this action against the defendant in error on a guaranty, and he seeks to distinguish the case of *Spokane County v. Prescott*, 19 Wash. 418, and other cases cited by us, claiming that the doctrine of these cases applies only to a surety on a statutory bond. This is, manifestly, erroneous. The principle announced by the Court in those cases is that where the undertaking of the surety is *collateral security* for the performance of the principal obligation by the principal debtor, no action can be maintained on the collateral security after the bar of the statute as to the principal obligation. The Court instances, as an illustration of the application of the rule, the case of a mortgage, which is collateral security for the debt; an illustration of its application totally inconsistent with the contention that it applies to sureties on statutory bonds only.

In the case of *Lindblom v. Johnson*, 158 Pac 972 (Wash.), the Court, referring to the Prescott case and explaining the principle upon which it was based, said:

“It was sought to hold the sureties on the theory that their promise to answer for the defalcation was in writing, and that liability thereon existed for six years, which time had not then expired. The judgment was rested on the ground that there could be no recovery against the sureties unless liability existed against the principal

at the time of the commencement of the action; this on the principle that their *undertaking was collateral* to his, and their liability ceased when his ceased." (Italics ours).

In other words, the principle announced by the Court in these cases is that where the obligation sued on is a collateral undertaking, and the debt had been barred as to the principal debtor, no action can be maintained upon the collateral undertaking against the persons collaterally liable. It is immaterial whether this collateral undertaking is in the form of a statutory bond executed by sureties or in the form of a mortgage as collateral security for the debt, or in the form of a guaranty of the obligation of another. The test is, was the undertaking collateral? The use of the word "surety" in this connection is somewhat confusing. Ordinarily, a surety's obligation is not collateral, but he is chargeable as an original promisor with the principal, while the guaranty is always a collateral undertaking.

"The vital difference between the contract of a surety and that of a guarantor is that a surety is charged as an original promisor, while the engagement of the guarantor is a collateral undertaking. A surety is a party to the principal obligation, undertaking, together with the principal debtor, that it shall be performed, while the guarantor is not a party to the principal obligation. In case of suretyship, there is but one contract binding the surety and the promisor, but in the case of a guaranty there are two contracts, one binding the principal debtor and one binding the

guarantor. A creditor may bring an action jointly against a surety and the debtor, but he cannot join both the guarantor and the debtor in one suit. The agreement of the surety is that he will do the thing which the principal has undertaken. The agreement of the guarantor is that the principal will do what he is bound to perform."

12 *Ruling Case Law*, p. 1057.

Brandt on Suretyship and Guaranty, §1.

Sometimes, however, the obligation of a surety is not direct and joint with the promisor, but is collateral, and such is the case of a surety on a bond.

In *Welch v. Walsh*, 59 N. E. 440, this distinction is pointed out:

"The difference between the contract of a guarantor and the contract usually entered into by a surety is that in case of a guarantor the promise of the person secondarily liable is a collateral promise to pay in case default is made by one who is primarily liable for the thing guaranteed, while a surety contracts directly as a principal to pay the sum of money for which he is secondarily liable. See *Bigelow, J., in Allen v. Herrick*, 15 Gray 274, 285. So far as this difference is concerned, the contract of the surety upon a bond conditioned for the payment of sums collected by a third person partakes of the nature of the contract of a guarantor, and not of the contract of a surety."

In each of the cases decided by the Washington Court, as well as in the other cases cited in our original brief on this question, the test applied is whether the undertaking sued on was a collateral undertaking or a direct obligation.

In the case of *State v. Blake*, 2 Ohio State 147, cited, the Court specifically stated that the bond was a collateral security and "that the collateral obligation can exist no longer than the liability it was created to secure."

Also, in *Couch v. Waring*, 9 Conn. 261, it was stated that:

"Whatever, therefore, amounts to a good defense to the original liability of the principal, is a good defense for the sureties when sued upon the collateral undertaking."

In none of these cases was there any intimation that the principle applied only to actions upon statutory bonds.

There is a conflict in the decisions of the various state courts upon this question, and plaintiff in error, in his brief, has cited a large number of cases holding the contrary doctrine. Many of these cases refer to the case of *State v. Blake*, and to cases in this state and in California, but none of them, so far as we have been able to examine them, distinguish these cases upon the ground that they applied only to sureties upon official or statutory bonds. On the contrary, they recognize the doctrine of the cases as being applicable to guarantors.

In *Seabury v. Sibley*, 66 N. E. 603, in an action against a guarantor, the Massachusetts Court recog-

nizes the Ohio case and the case of *Bridges v. Blake*, 106 Ind. 332, as being applicable to actions against guarantors, but holds that those cases are against the weight of authority, and refuses to follow them.

We, of course, are not now concerned with the question of the weight of authority, or even of the correctness of the principle of the Prescott case. It is the established law of the State of Washington, and, of course, is controlling in the case at bar.

Plaintiff in error cites a large number of cases on pages 14 and 15 of his reply brief to the effect that the rule we contend for is not applicable to voluntary commercial guaranties of payment. Whether a surety who is an original promisor is released from his obligation when the bar of the statute has run against the principal debtor, is a question upon which there is a conflict of decision. In California, as shown by the cases cited by plaintiff in error, it is held that a surety who is an original promisor with the principal, is not released by the running of the statute against the principal; whereas, in the case of *County of Sonoma v. Hall*, 62 Pac 257, the same Court held that a surety on a bond, that being a collateral undertaking, was released when the statute ran against the principal debtor. The same rulings were made in Kansas and Ohio, as shown by the cases cited by plaintiff in error, it being

held that sureties who were original promisors were not released by the bar of the debt against the principal, but that sureties who were only collaterally liable were released when the principal debtor was released by limitation. These cases are not contrary to our contention, but are entirely consistent with it.

Plaintiff in error contends that the obligation of an absolute guarantor is the same as that of a surety. While the obligation is in many respects similar to those of a surety, it is not accurate to say that they are the same. One is a direct and the other a collateral undertaking. The guarantor is a surety in the sense that his liability is secondary, and he is consequently entitled to the rights resulting therefrom. It was in this sense that it was spoken of as the obligation of a surety in *Davis v. Wells*. In *Douglass v. Reynolds*, 7 Peters, 113, 127, the Court said that "by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him and a failure on his part to perform his engagements are indispensable to constitute a *casus foederis*."

IV

PROOF OF DEBT

The Court below excluded both of the accounts offered by the plaintiff in error, showing the in-

debtedness from the English corporation to the Bank, upon objections made by the defendant that the indebtedness was not properly proven. In the reply brief, plaintiff in error cites as proof of the indebtedness the following evidence:

(a) Statement by Lang (Record p. 43), as follows:

“The sums advanced by the Commercial Bank of Scotland, Ltd., were advanced against cheques drawn by Frank Waterhouse, Ltd., upon the Commercial Bank of Scotland, Ltd.”

Manifestly, this is no proof of any item in the account. The witness Lang was an accountant in the Bank, and did not have or profess to have any personal knowledge of the advances represented by these various accounts. The only information he had was the appearance of the accounts on the books of the Bank. The statement that the sums advanced were advanced against checks drawn by the English corporation does not in any manner tend to prove what sums were in fact advanced.

(b) Responding to our criticism to the effect that the checks were not produced at the trial or before the Commissioner taking the depositions in this case, plaintiff in error states that the checks drawn on the Loan Account accompanied one of the suppressed depositions. No such fact appears in the record; and if the plaintiff was in possession

of these checks at the time of the trial and failed to introduce them, he manifestly can claim no benefit therefrom.

(c) Statement of McEwen, on page 36 of the Record, to the effect that he had in his possession the checks drawn upon the General Account and Number 2 Account, but could not part with them, and that he had compared them with one of the accounts offered in evidence and that they agreed with the figures stated in that account. These checks had no reference to the principal or loan account constituting the major part of the indebtedness, and which was incurred before McEwen became connected with the English corporation. The most that can be inferred from McEwen's statement is that he has certain checks in his possession which agree with the debit items of the two smaller accounts; he does not claim to have any knowledge of the transactions beyond the fact of the possession of the checks.

There were three accounts known on the books, respectively, as the "Loan Account," "Number 2 Account," and "General or Current Account." The checks mentioned by McEwen as being in his possession were, according to his statement, the checks drawn on the Number 2 Account and the General or Current Account, attached to the deposition of

Coutts (Record, p. 36). This account referred to by McEwen was offered in evidence as Plaintiff's Exhibit "E" (Record, p. 40) and excluded on objection of defendant. The Number 2 Account, referred to by McEwen in this connection, being Plaintiff's Exhibit "E," is found on pages 109-110 of the Record. The General or Current Account referred to by him is found on the lower half of Record, page 113. There are two debit items on the Number 2 Account (Plaintiff's Exhibit "E"), one being a charge of £5,000 under date of June 20, 1898, and a charge of £400 under date of August 12, 1898.

McEwen did not become connected with the English corporation until August, 1898. This debit item of £5,000, under date of June 20, 1898, was a charge made prior to the time he became connected with the company, and he does not claim to have had any knowledge concerning it except that at the time his deposition was taken he had a check in his possession corresponding with that item.

The debit charge of £400, under date of August 12, 1898, is shown by the account to have been immediately repaid, apparently on the same day, as the next item on the account is a credit item for the same amount. All other debit items on this Account Number 2 are mere charges of interest which, of course, do not represent any checks. There are two

other debit charges on the Account Number 2, found on Record p. 110, under date of September 28 and October 30. It is impossible, however, to determine from the account itself whether these debits represent cash advances, interest charges or debits of some other nature. It is thus manifest that, so far as this Account Number 2 is concerned, McEwen held only one check in his possession, and that is for a charge made before he became connected with the debtor corporation.

Turning to the General or Current Account of Exhibit "E," found on Record p. 113, we find that the first item of the account is a credit of £700 under date of May 6, 1901, which is offset by the debit charge under date of March 1, 1902, for £700. The other items on the account are merely interest charges, and the account itself is balanced under date of May 5, 1903.

There is another and different statement of the account of the Bank found in the record, being Plaintiff's Exhibit "D," (Record, p. 94), which is the account about which the witness Lang testified. The account referred to by witness McEwen, however, and with the items of which he claims to have compared the checks in his possession, was an account attached to Coutts' deposition and which is Plaintiff's Exhibit "E." From the analysis given above, it is plain, therefore, that the only debit charge on the

accounts referred to by McEwen which could have been represented by any check in his possession was the single item of June 20, 1898, about which the witness does not claim to have had any personal knowledge whatsoever. The plaintiff did not offer in evidence these two accounts, that is, the General Account and Number 2 Account, separated and severed from the Loan Account. The debit item of £5,000, which, as we have shown above, is the only debit charge on these two accounts which we can infer was represented by any check, is dated June 20, 1898, and was, of course, barred by the statute of limitations. Under the decisions of the State of Washington, as cited in our original brief, the subsequent credit entries on the account and the debit entries of interest charges thereon made by the Bank, did not stop the running of the statute of limitations.

In any view that can be taken of the matter there was no error in the ruling of the Court excluding the account known as Plaintiff's Exhibit "E."

(d) The statement of Lang (Record p. 42), to the effect that he had examined the accounts and that they are copies of the accounts taken from the books of the Bank. Manifestly, this statement is not proper evidence of the indebtedness represented by the accounts. It might be accepted as proof that

the copies of the accounts tendered in evidence were copies taken from the books of the Bank, but it has no tendency whatever to prove the indebtedness itself. It has never been held by any Court, so far as our researches have gone, that a copy of an account on the creditor's books is of itself proof of the indebtedness against the debtor. The authorities are cited in our original brief.

Other questions discussed in the reply brief are considered by us in our original brief.

Respectfully submitted,

HAROLD PRESTON, AND

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Defendant.

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No. 2903

**In the United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

JOHN GILL, for whom has been substituted Maurice
McMicken, Administrator with the will annexed of John
Gill, deceased,

Plaintiff in Error.

vs.

FRANK WATERHOUSE,

Defendant in Error.

**Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.**

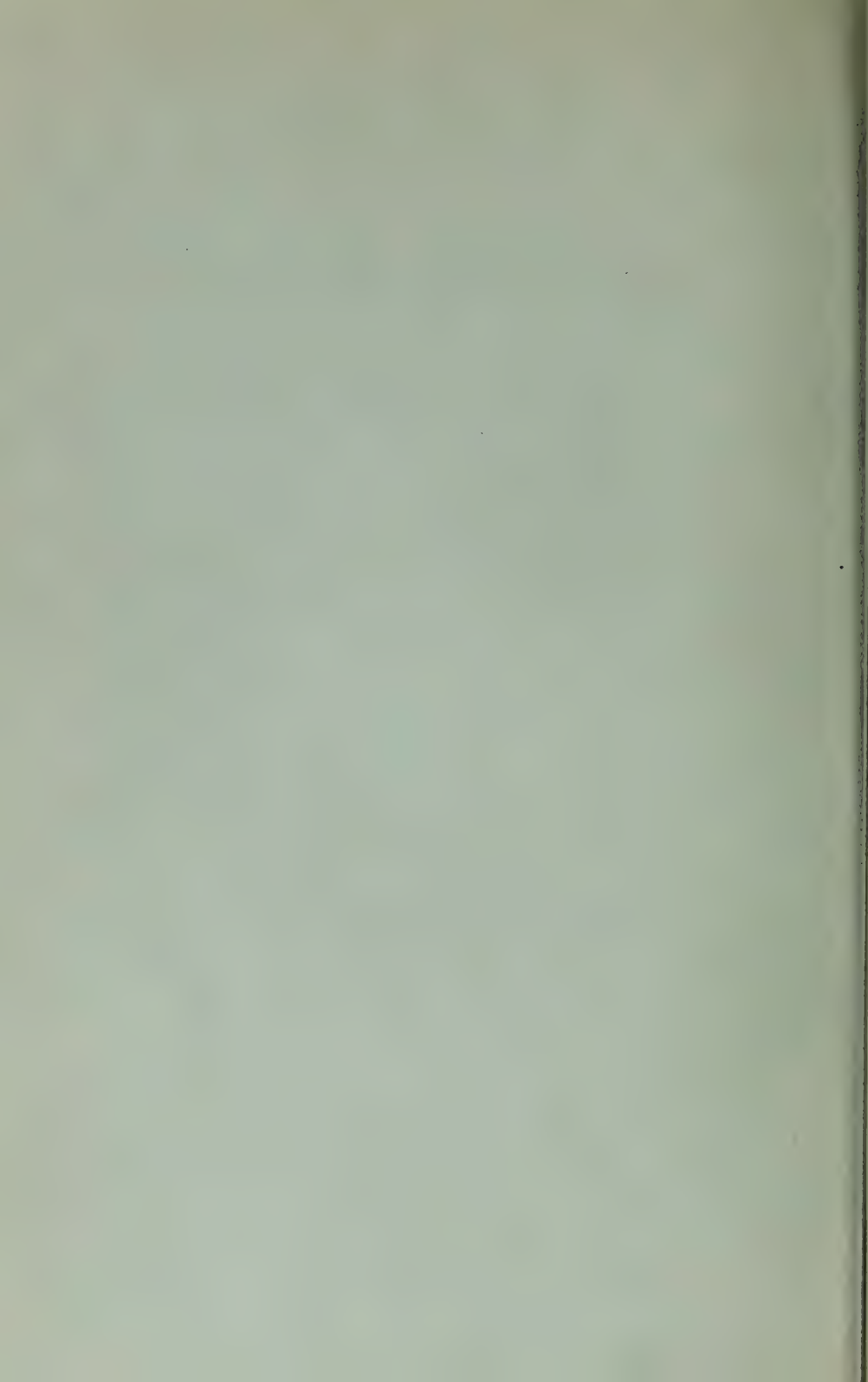
REPLY BRIEF

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MAR 15 1917

F. D. McMeekin,
Clerk.



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REPLY BRIEF

The privilege of filing a reply brief will be exercised only so far as relates to the propositions or contentions made in the answering brief of defendant in error which have not been fully covered by our original brief.

I.

Acceptance of Guaranty.

It is contended that an acceptance of the guaranty in issue by The Commercial Bank of Scotland, Limited, and notice thereof to the guarantor was essential to make it a binding and enforceable contract. We concede the rule to be well settled in the Supreme Court of the United States that in case of offers of guaranty or conditional guaranties, delivery and acceptance by the guarantee and notice thereof to the guarantor are essential to constitute a valid and binding contract between guarantor and guarantee, the rule being based upon the theory that without the observance of these conditions the transaction lacks the essential requisites of a contract. This is not the rule, however, in respect to guaranties which in terms are absolute and unconditional, since they imply knowledge and intention on the part of the guarantor that they will be accepted and acted upon by the guarantee. Not only is this generally recognized by the courts, but it is likewise especially so recognized by the Supreme Court of the United States.

Davis v. Wells, 104 U. S. 159, 169.

United States Fidelity Co. v. Riefler, 239 U. S. 17, 25.

In *Davis v. Wells* (*supra*), the guaranty was very similar to the one here in issue, except that it recited a consideration of one dollar, running from the guarantee to the guarantor. In that case there was

an unconditional guaranty of any indebtedness of Gordon & Co. to Wells, Fargo & Co. not exceeding \$10,000, on any overdrafts then made or thereafter to be made; and it was provided that the guaranty should continue until revoked by the guarantors in writing. After a discussion of the effect of the recital in the instrument of a consideration, the Court proceeds to consider the other language of the guaranty, and says:

“The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious, and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of the surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally, to promote the use and convenience of commercial intercourse.”

In *United States Fidelity Co. v. Riefler* (*supra*), Mr. Justice Holmes, speaking for the Court, says:

“The bond on its face contemplated that the Company would accept it and act upon it at once, and disclosed the precise extent of the obligation assumed. It seems to us that when such a bond, carrying, as a specialty does, its complete obligation with the paper, is put by the obligors into the hands of the obligee and in fact is accepted by it, notice is not necessary that a condition subsequent to the

delivery by which the obligee might have made it ineffectual has not been fulfilled. The contract is complete without the notice [citing certain English cases], and we see no commercial reason why the principles ordinarily governing contracts under seal should not be applied."

If any significance is to be attached to the reference of the Court in the above case to the fact that the contract was sealed, this Court will take notice that seals have been now generally abolished. This is true in the State of Washington, where the statute provides:

"The use of private seals upon all deeds, mortgages, leases, bonds, and other instruments, and contracts in writing, is hereby abolished, and the addition of a private seal to any such instrument or contract in writing hereafter made, shall not affect its validity or legality in any respect." (R. & B. Code, §8751.)

It was long ago held by the Supreme Court of the United States that, where by the law of the forum seals were abolished, a contract under seal was not to be distinguished from one without.

Wilcox v. Hunt, 13 Pet. 378.

The guaranty here involved was absolute and unconditional in its terms, and not a mere guaranty of collection or an offer to guarantee. It is addressed to The Commercial Bank of Scotland, Limited, and declares: "I, Frank Waterhouse, * * * hereby guarantee you payment of all sums for which Frank Waterhouse, Limited, * * * are or may be liable to you." It further declares: "(1) That you shall be entitled to require from me whenever you

think fit, a payment or payments to account of my liability; (2) that you may grant to the said Frank Waterhouse, Limited, * * * time or other indulgence * * *; (3) that I shall not be entitled to rank on the estate of the said Frank Waterhouse, Limited, in respect to any payment or payments to account as aforesaid, * * * until your whole claims against them are satisfied; (4) that this guarantee is a continuing obligation and can be recalled by me only by writing and shall remain in force notwithstanding my death until recalled in writing." It was made in the light of an existing relation between bank and customer, and to secure a continuance of that relationship and an extension of credit. It was, moreover, made by an officer of a corporation on behalf of the corporation which bore his name, and with whose banking relations and credit he must be presumed to have had knowledge.

Even if acceptance and notice thereof were requisite, it will be observed that Frank Waterhouse executed this guaranty of the present and future indebtedness of Frank Waterhouse, Limited, to the Bank with which it was then doing business, in the presence of the Manager and the Accountant of the Bank itself; that the instrument of guaranty remained in the hands of the Bank until assigned and delivered to John Gill, now deceased, original plaintiff herein; and that the Bank in fact granted further credit and indulgence as contemplated by the guaranty. Moreover, defendant in error alleges in his sixth affirmative defense (Record, p. 13):

“That at the time of the execution and delivery of said letter of guaranty set forth in paragraph numbered V of said amended complaint, other letters of guaranty of like import and of the same tenor and substance were executed and delivered to said The Commercial Bank of Scotland, Limited * * * and were based upon the same consideration and were each delivered to said The Commercial Bank of Scotland, Limited, simultaneously with the delivery of the letter of guaranty of this defendant, and that the execution and delivery of said letters of guaranty by the above-named parties, and by this defendant, were parts of one and the same transaction, and to secure the same indebtedness alleged in said amended complaint, and were accepted by said The Commercial Bank of Scotland, Limited, at one and the same time as such security.”

II.

Payment.

It is contended in the brief of defendant in error that the District Court was right in holding that the evidence in the case conclusively established payment by John Gill of the debt of Frank Waterhouse, Limited.

Let us concede at the threshold of this inquiry that where payment of an indebtedness is made by a stranger thereto, without any convention between him and the debtor or between him and the creditor that he is to take over and hold the obligation as an enforceable demand against the debtor, his act will constitute payment. The question here is whether there was a convention, a meeting of minds, between John Gill and the creditor bank that the payment

by Gill was a purchase, and not an extinguishment of the debt. What, therefore, are the facts?

(1) The following was shown in the testimony of James Gill, without objection:

“The bank were desirous that the debt due by Frank Waterhouse, Ltd., should be repaid and Mr. Alexander McNab, who was one of the guarantors and who was not * * * in a position to meet the guarantee if it were enforced against him, approached the late John Gill as a friend and asked him to *take over* the debt; that the late John Gill agreed to do so, and paid off the debt * * * and obtained the assignation * * * in consideration of said payment by him to the Bank.” (Record, p. 26.)

The fact that he agreed to “take over” the debt certainly does not imply an intention on his part to satisfy and discharge it.

(2) William Bamford Lang, the Accountant of the Bank, testified that the advances to Frank Waterhouse, Limited, were made by the Bank on four letters of guaranty, including the one in suit (Record, p. 45); and James Lawson Anderson, Secretary of the Bank, testified that *on payment being made by John Gill, these guaranties were sent to him*; and also testified that the payment “was made to the Bank by the said John Gill in exchange for the assignation in his favor.” (Record, p. 32.)

This clearly evidences that the Bank did not understand the transaction to be one of payment and discharge of the debt, else it would not have delivered the guaranties to Mr. Gill, but would instead have given an acknowledgment of payment and have returned the guaranties to the parties from whom it

had received them. Neither an irregular course of business nor bad faith can be presumed on the part of the Bank.

(3) The subsequent written assignment of the guaranty in suit, unless made in pursuance of the mutual understanding of the parties at the time of the payment by Gill to the Bank, would be out of the usual course of banking transactions, if not a positive act of fraud; and neither can be presumed.

If the transaction was a purchase, the guaranties followed the debt, and the mere delivery was sufficient to authorize the holder to sue thereon in the courts of Great Britain.

In re Hallet & Co., (1894) 2 Q. B. 258.

See also:

Page on Contracts, §1268.

Wooley v. Moore, 38 Atl. 758 (N. J.).

Van Pelt v. Hurt, 25 S. E. 489 (Ga.).

The reasonable inference, the one which should be drawn by a jury, is that the subsequent formal written assignment was made solely in contemplation of a suit in a foreign country.

In the brief of defendant in error, in support of the contention that the transaction was one of payment, and not of purchase, reliance is placed upon a certain agreement executed in October, 1900, between Frank Waterhouse and Frank Waterhouse, Limited, which was admitted over the objection of plaintiff in error. The Bank was not a party to this agreement, and an examination of the instrument (Record, p. 126) will disclose that it has no

bearing upon the question here involved and that its admission in evidence was erroneous. Moreover, it does not appear that any of the essential covenants of the agreement were ever performed by the defendant in error or by the corporation which he was to create.

In support of the contention that the facts of this case constitute payment, defendant in error cites and relies on the following cases:

Penwell v. Flickinger, 129 Pac. 324 (Mont.).
Moran v. Abbey, 63 Calif. 56.
Day v. Humphrey, 79 Ill. 452.

The Montana and California cases were cited before the trial court and have been sufficiently distinguished in our original brief.

In the case of *Day v. Humphrey*, the facts are these: A note for \$200.00 was given in July, 1870, to a National Bank by one Humphrey, as principal, and one Hinckley as surety. When the note became due, Humphrey applied to Day (plaintiff) to borrow \$200.00 until the first of April following, for the purpose of taking up the note, and Day agreed to let him have the money. They met at the Bank, when plaintiff gave his check for \$200.00 and Humphrey paid the interest due, and the cashier surrendered the note to them. Thereupon Humphrey proposed to give his note to plaintiff, payable on the first of April following, but plaintiff said the old note was good enough. It was then suggested that the Bank endorse the note, and it was thereupon returned to the cashier for that purpose and by him

endorsed without recourse. Humphrey subsequently became insolvent, and Day brought action in 1874 against him and the surety on the note. On these facts, the Court very properly said:

“The arrangement could not bind Hinckley, who was a mere security, and was not present, consenting to it. The \$200 paid to the bank to take up the note, was, in fact, a loan by plaintiff to Humphrey, to be repaid on the first of the ensuing April. The conduct of the parties is inconsistent with any other theory of the case.”

Comment on this case would appear to be unnecessary.

It should be further observed that upon this plea of payment of the debt of the principal the burden of proof in the trial court was upon the defendant. The plaintiff sued upon a formal written assignment of the defendant's guaranty and the cause of action arising against him thereunder. A *prima facie* case was made upon proof of the guaranty and assignment and proof of the debt of the principal. It surely cannot be held that upon the evidence introduced by the plaintiff alone, the defendant has sustained the burden of proving the payment of the debt so conclusively that the question must be withdrawn from the jury.

III.

The Statutes of Limitation.

It is contended by the defendant in error that even though the judgment of the trial court cannot be sustained upon the grounds assigned by that

court in support of its ruling, the judgment should nevertheless be affirmed because plaintiff's cause of action is barred by the statutes of limitation.

Statutes of limitation are always matters of defense and must be affirmatively pleaded. In the State of Washington they relate only to the right to sue and do not render a claim void after the period prescribed. Section 155 of Remington & Ballinger's Code provides that "actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, * * * but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer"; and then follow the sections quoted in the brief of defendant in error.

Several such defenses were attempted to be interposed by the answer in this case. In the brief of defendant in error various questions thus presented are intermingled. We shall, however, so far as may be, consider them separately.

(1) The second and third affirmative defenses plead the three-year statute of limitations of the State of Washington. But as the cause of action herein is upon a written contract of guaranty, this plea may be disregarded.

(2) It is, however, urged in the brief of defendant in error "that the three-year statute applies to the principal debt and the principal debtor," and in this connection counsel discuss the subject of mutual accounts and of partial payments by the debtor. The only such defense attempted to be pleaded is

found in the so-called fifth affirmative defense, where it is alleged that the indebtedness of Frank Waterhouse, Limited, is upon open account, that the right of action of plaintiff and his assignor thereon "accrued more than three years before the commencement of this action," and that said debtor was "discharged and released from any liability therefor or thereupon by the bar of the statute of limitations." Thus it will be seen that the defendant in error has attempted to plead the three-year statute of limitation of the State of Washington to a mere right of action, one which has never been commenced within this State.

Both Frank Waterhouse, Limited, the principal debtor, and The Commercial Bank of Scotland, Limited, the original creditor, were at all times domiciled in Great Britain, as was also John Gill, the assignee. The cause of action arose there and was enforceable in the courts of that country and according to its laws.

By Section 178, R. & B. Code of Washington, it is provided:

"When the cause of action has arisen in another state, territory, or country between nonresidents of this state, and by the laws of the state, territory, or country where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state."

If it were intended to allege as a defense herein that the claim was either void or unenforceable by the laws of Great Britain and in its courts, it would be necessary to plead the statute of limitations of

that country by its title and words or full substance, and to introduce proof thereof. For while in mere matters of administration, courts may presume the law of a foreign country to be the same as the law of the forum, when a substantive right either of action or defense is predicated upon a foreign statute, such statute must be pleaded and proven.

Lowry v. Moore, 16 Wash. 476, 479.

Cuba R. R. Co. v. Crosby, 222 U. S. 473, 479.

Thomas v. Grand Trunk Ry. Co. (Del.), 42 Atl. 987.

Wharton on Conflict of Laws, Vol. 2, pp. 1563, 1564.

Murphy v. Collins, 121 Mass. 6.

Ellis v. Maxson, 19 Mich. 186.

Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 445.

So likewise it would be necessary to allege and prove that the indebtedness had not been acknowledged by the debtor in writing or otherwise within the statute and that no action had been commenced against the debtor within the period prescribed by the statute. Both the requisite allegations and proofs are lacking in this case.

“There is no presumption of law from the mere fact that the time has elapsed which is fixed by the statute for the commencement of the action, that the cause of action is barred by the statute of limitations. The court will not presume facts as to which there is no evidence to relieve a party from the bar of the statute.”

25 *Cyc.* p. 1423.

(3) But counsel for defendant in error, assuming, as a correct premise, that the cause of action

against the principal debtor was barred at the commencement of this action, contend that the right of action herein is, therefore, likewise barred. Even if the premise so assumed were correct, however, the conclusion is not well founded in law. The contention is based upon the following cases.

Spokane County v. Prescott, 19 Wash. 418,
and other decisions of that court predicated
thereon.

Mulvane v. Sedgley (Kans.), 64 Pac. 1038.

State v. Blake, 2 Ohio St. 147.

County of Sonoma v. Hall (Calif.), 62 Pac.
257.

United States v. Axman, 152 Fed. 816, 821,
822.

The latter case was decided upon the authority of the case of *County of Sonoma v. Hall* (*supra*).

All of these cases are based upon official and statutory bonds. They proceed upon the theory that the obligation was one arising by statute, and the written instrument being merely collateral, no new obligation is imposed or assumed by it.

In each of these States the rule is denied in respect to voluntary commercial guaranties of payment.

California:

Whiting v. Clark, 17 Calif. 407.

Sichel v. Carrillo, 42 Calif. 493.

Bull v. Coe, 77 Calif. 54.

Kansas:

Baker v. Skinner, 64 Pac. 981.

Ohio:

Camp v. Bostwick, 20 Ohio St. 337.

Dye v. Dye, 21 Ohio 86.

Washington:

Donneberg v. Oppenheimer, 15 Wash. 290.

That the bar of the statute against the principal debtor will not bar an action against the guarantor upon a written guaranty of payment, is held by the great weight of judicial authority.

Streeper v. Sewing Machine Co., 112 U. S. 676.

Nelson v. First Natl. Bank of Killingsley, 69 Fed. 798. (Opinion of Court of Appeals for Eighth Circuit by Sanborn, J.)

People v. White, 11 Ill. 348.

Seabury v. Sibleu (Mass.), 66 N. E. 603.

Willis v. Chowning (Tex.), 59 Am. St. 842.

Hooper v. Hooper (Md.), 48 Am. St. 496.

Johnson v. Planters Bank (Miss.), 43 Am. Dec. 480.

Darby v. Berney Natl. Bank (Ala.), 11 So. 881.

Fales & Jenks Machine Co. v. Browning (S. C.), 46 S. E. 545.

Cowan v. Roberts (N. C.), 46 S. E. 979.

Rogers v. Chambers (Ga.), 37 S. E. 429.

Osborne & Co. v. Gullikson (Minn.), 66 N. W. 965.

Davis v. Graham, 29 Iowa 514.

Goff v. Janewau (Ky.), 99 S. W. 602.

Hunt v. Bridgeman, 19 Mass. 582.

McKee v. Needles (Iowa), 98 N. W. 618.

State v. Murphy (Nev.), 48 Pac. 628.

The rule is thus stated in 20 Cyc. p 1486:

"The courts generally hold that the creditor may proceed against an absolute guarantor of payment even when his action is barred against the principal debtor."

1 Brandt on Suretyship and Guaranty, (3d Ed.) §§376, 508.

2 Randolph on Commercial Paper, (2d Ed.)
§§924, 926.

“It is a rule of law that a creditor may suspend his right forever against the principal debtor, and yet preserve his rights against the surety.”

Green v. Wynn, 38 L. J., Ch. 76; L. R. 7, Eq. 28; 19 L. T. 553; 17 W. R. 72; Affirmed, 38 L. J., Ch. 220; L. R. 4 Ch. 204; 20 L. T. 131; 17 W. R. 385.

The rule so recognized by the authorities is undoubtedly correct when applied to absolute and unconditional guaranties like the one here in issue. The obligation of such a guarantor is that of a surety.

Davis v. Wells, 104 U. S. 169.

Hooper v. Hooper, 81 Md. 155, 48 Am. St. 496.

Iron City Natl. Bank v. Rafferty, 56 Atl. 445.

In *Davis v. Wells* (*supra*) the Court, in speaking of such a guaranty, said that “the contract of guaranty is the obligation of a surety.” The liability of the surety is immediate and direct. “He agrees that he will perform the principal contract, fixing upon himself the responsibility from the beginning.” (*Stearns on Surety*, 2d Ed., §6).

(4) The only remaining plea of the statutes of limitation to be considered is that pleaded in the fourth affirmative defense, which alleges “that the cause of action set forth in said amended complaint did not accrue within six years before the commencement of this action.”

Notwithstanding this plea, counsel for defendant

in error assert, on page 38 of their brief, that the contention that the "case is ruled by the six-year statute * * * is an erroneous contention." We are at a loss to understand this position. The cause of action here involved is based upon a written contract of guaranty, and but for it, no liability herein would attach to the defendant in error. By the terms of the statute an action "upon a contract in writing, or liability, express or implied, arising out of a written agreement," must be commenced within six years after it accrues. It has even been held by the Supreme Court of the State of Washington that because of the peculiar language of this statute, the action for contribution between co-sureties upon a promissory note is controlled by it.

Caldwell v. Hurley, 41 Wash. 296.

Lindblom v. Johnson, 92 Wash. 171.

It is urged in the brief of counsel for defendant in error that "by the express terms of the guaranty involved in this case, the money was payable by the guarantor upon demand." This statement, we think, is correct. The guaranty provided "that you shall be entitled to *require from me whenever you think fit* payment or payments to account of my liability." The instrument of guaranty contemplated a request or demand before payment would be exacted, and hence demand was doubtless a condition precedent to the right to sue.

First Natl. Bank of Waterloo v. Story (N. Y.), 93 N. E. 940, and cases cited.

Bolles v. Stearns, 65 Mass. 320.

Such a demand was alleged in the complaint in suit and was proven on the trial. (See Plaintiff's Exhibit "C," Record, p. 90).

But it is contended that because a demand was necessary, the right of action accrued thereon immediately upon the execution of the guaranty as to all previous advances and separate rights of action from the date of each subsequent advance. The cases of *Brooks v. Trustee Company*, 76 Wash., and *Douglass v. Reynolds*, 7 Peters, cited in support of this contention, are not in point. The case of *Douglass v. Reynolds* was an undertaking to be responsible to the guarantee only in case the debtor failed to pay. In other words, the liability was not that of a surety. In that case the Court properly said:

"All that could be required would be, that when all the transactions between the plaintiffs and Haring under the guarantee were closed, notice of the amount for which the guarantors were held responsible should, within a reasonable time afterwards, be communicated to them."

The rule applicable to promissory notes payable on demand, namely, that no demand is necessary before bringing action thereon, does not apply, as we have seen, to actions upon guaranties such as the one here involved. The rule is, we think, correctly stated in *First Natl. Bank of Waterloo v. Story* (*supra*), where it is said:

"(1). When the promise is to pay one's own debt for a specified amount on demand, no demand need be alleged or proved.

"(2). When the promise to pay on demand is not to pay one's own debt, but is a collateral promise

to pay the debt of another, a demand is necessary, for it is part of the cause of action.”

It has, indeed, been frequently held, even in actions upon a promise to pay a certain sum of money on demand, that where the contract, construed by its terms and in the light of the situation of the parties and the objects and purposes in view, discloses a mutual intention that demand in fact be made, such demand is necessary before a cause of action accrues.

New England Fire Ins. Co. v. Haynes (Vt.),
45 Atl. 221, 76 Am. St. Rep. 771.

Stanton v. Stanton, 37 Vt. 413.

Jameson v. Jameson, 72 Mo. 640.

Daniels v. Daniels (Calif.), 85 Pac. 134.

Massie v. Byrd (Ala.), 6 So. 145.

Wood on Limitation of Actions, p. 256.

In determining, therefore, when the cause of action accrued, the Court must look to the terms of the contract, the situation of the parties, and the objects and purposes sought to be accomplished by the parties thereby. As is said in *Hooper v. Hooper* (*supra*):

“A guaranty is a mercantile instrument to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical accuracy, but in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse. It should be given that effect which will best accord with the intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject matter to which it relates, and neither enlarging the words beyond their natural import in favor of the creditor, nor restricting them in aid of the

surety. The circumstances accompanying the whole transaction may be looked to in ascertaining the understanding of the parties."

In the light of these principles, what was the intention of the parties? Frank Waterhouse was a stockholder and officer of the corporation which bore his name. As said by the Supreme Court, in *Hawkins v. Glenn*, 131 U. S. 329:

"A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

The corporation was a customer of The Commercial Bank of Scotland, and upon the strength of the letters of guaranty of its officers it had secured credit for a very large sum. It was manifestly not prepared to pay this indebtedness consistently with the prosecution of its enterprises, and its officers desired indulgence and the privilege of further advances to it; otherwise, there would be no occasion for the execution of the guaranty. The instrument not only authorized such indulgence, but provided that it might be given without consulting Waterhouse and without affecting his obligation thereunder. It likewise provided that the guaranty was a continuing obligation and one that could be recalled by him only in writing.

Further advances were made and time and indulgence in fact granted, and the relationship contemplated by the written guaranty continued until the closing of the accounts on the 31st of October, 1903.

By the terms of the contract, either party could bring it to an end, or in other words, could commence the tolling of the statute of limitations. This could be done by the guarantor, by giving the stipulated notice in writing; or by the guarantee, by refusing to make further advances and to grant further indulgence. No such notice was given by the defendant in error. The Bank, however, by closing its accounts with the debtor, may be said to have terminated the further function of the contract. At that time it might proceed to collect the indebtedness, upon making demand upon the guarantor. It is immaterial in this case whether the statute began to run against defendant in error from the date of the demand or from the date when the transactions were closed, to-wit, October 31, 1903; that it did not commence to run at an earlier date clearly follows from a proper interpretation of the agreement of the parties.

Jones v. Trimble (Penna.), 3 Rawles 381.
Bank v. Knotts (S. C.), 70 Am. Dec. 234.
Hooker v. Gooding, 86 Ill. 61.
Goff v. Janeway (Ky.), 99 S. W. 602.
City Natl Bank v. Phelps, 86 N. Y. 484.
Daniels v. Daniels, 85 Pac. 134.
Stanton v. Stanton, 37 Vt. 413.

IV.

Proof of Debt.

An elaborate argument is made in the brief of defendant in error in support of the contention that the proof of debt was insufficient to carry the

case to the jury. The proof is undisputed that all advances were made by the Bank upon checks drawn by Frank Waterhouse, Limited, and signed by two directors and by the secretary. (Deposition of Lang, Record, p. 43.)

Counsel state in their brief that "none of these checks were produced at the trial or before the commissioner taking the depositions"; overlooking the fact that the checks drawn on the loan account accompanied one of the suppressed depositions. As to the other checks, McEwen, the secretary of the corporation, testified:

"I have not in my possession the cheques drawn upon the loan account. I have the cheques which operated on the current or general account and No. 2 account, but as liquidator of the company I cannot part with them. I have compared them with the copy accounts marked A, B and C appended to the said deposition of Mr. George Sutherland Coutts, and they agree with the figures stated in that account."

And he adds:

"The advances made to Frank Waterhouse, Ltd., were made at the instance and request of the board of directors of the company." (Record, p. 36).

An elaborate argument is also made to show that the proof of accounts of the Bank was insufficient and the evidence thereof incompetent. It should be here remarked that while, as a matter of convenience in bookkeeping, the principal moneys advanced by the Bank to the corporation were charged to it in what is denominated "Loan Account," the items so advanced are all credited in the general or

checking account of the corporation on the dates thereof, and they therefore evidence but a single series of transactions. William Bamford Lang, who was the accountant of the London Bank at the time of these transactions and who made out and certified to the accounts in evidence attached to the assignation, testified:

“I have examined the accounts attached to the said assignation by the Commercial Bank of Scotland, Ltd., in favor of the said John Gill, and they are full copies of the accounts of Frank Waterhouse, Ltd., taken from the books of the bank. They are certified correct by me, and the books from which they were taken were the ordinary books of the bank kept in the regular course of the bank’s business and they were in the custody and control of the bank.” (Record, p. 42).

This evidence is competent and sufficient under the stipulation upon which the depositions were taken.

But specific proof of an itemized account is not necessary to support this action. The obligation of the guarantor was to pay all sums for which the corporation is or may be liable to the Bank, with interest thereon from the date or dates of such liability, not exceeding £21,000. The creation and existence of the indebtedness was abundantly proved by the testimony. It was expressly admitted by the secretary of the company. A statement of the indebtedness of the corporation accompanied the demand on the defendant in error (Plaintiff’s Exhibit “C”, Record, p. 90), produced by him at the trial, and to it no objection was ever made by him.

In view of what was said in the original brief and at the oral argument, we deem it unnecessary to make any reply to that portion of defendant's brief devoted to the subject of hearsay evidence.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

In the United States Circuit Court of Appeals

For the Ninth Circuit

JOHN GILL, for whom has been substituted Maurice
McMicken, Administrator with the will annexed
of John Gill, Deceased,

Plaintiff in Error,

vs.

FRANK WATERHOUSE,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
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INGTON, NORTHERN
DIVISION

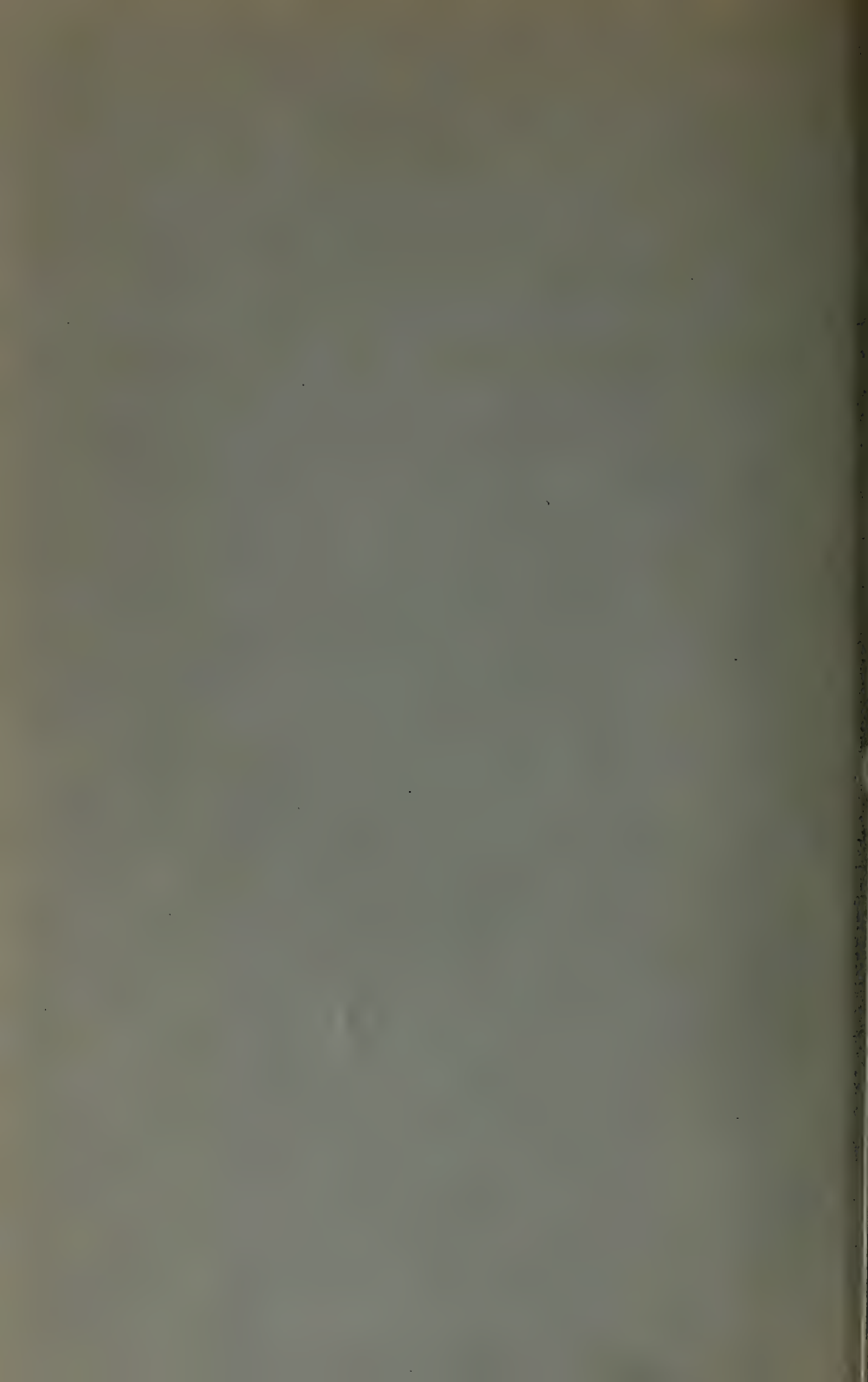
BRIEF OF DEFENDANT IN ERROR

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Filed

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No. 2903

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UPON WRIT OF ERROR TO THE UNITED
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BRIEF OF DEFENDANT IN ERROR

This was an action at law brought by the plaintiff
in error John Gill, of Edinburgh, Scotland, against
Frank Waterhouse, of Seattle, Washington.

The complaint alleges in substance that Frank Waterhouse, Limited, a British corporation having its head office in London, was indebted to The Commercial Bank of Scotland, Limited, also a British corporation having a branch office in London. That on the 16th day of February, 1889, at London, the said Frank Waterhouse, Limited, and the said Frank Waterhouse were desirous of obtaining from said bank certain further advances to Frank Waterhouse, Limited. That the bank thereupon agreed to make such further advances upon being guaranteed by the said defendant Frank Waterhouse the payment by the said Frank Waterhouse, Limited, of advances theretofore made by the bank and advances to be thereafter made, and that in consideration thereof, the defendant executed a certain Letter of Guarantee, guaranteeing payment to the bank, which is set out in the pleadings. That between March 18, 1898, and October 31, 1903, the said bank, at the special instance and request of said Frank Waterhouse, Limited, and of the defendant, advanced to said Frank Waterhouse, Limited, sums aggregating £103217-11-11, upon which there remained due the bank on September 15, 1907, \$109,909.54. That the bank from time to time and up to October 31, 1906, at the special instance and request of Frank Waterhouse, Limited, and of this defendant, granted to Frank Waterhouse, Limited, and to the defendant, time and indulgence upon said indebtedness; and upon October 31, 1906, said bank made a demand

upon this defendant for immediate payment of the amount due on account of advances so made to Frank Waterhouse, Limited. That prior to the commencement of this action, the said bank, for a good consideration, assigned to plaintiff "said letter of guarantee hereinbefore set forth, together with its demand against said defendant," and that the plaintiff is now the owner and holder thereof. The defendant by proper pleading admitted executing the Letter of Guarantee referred to, but denied all the other material allegations of the complaint and put the plaintiff upon full proof. The defendant also pleaded by affirmative defenses that any amount owing from Frank Waterhouse, Limited, to said bank had been paid to said bank prior to said alleged assignment of the letter of guarantee; that the cause of action stated in the complaint is barred by the statute of limitations of the State of Washington; that the principal debtor, Frank Waterhouse, Limited, had been, prior to the commencement of this action, discharged and released from any liability for any indebtedness to the bank.

Upon the conclusion of the testimony on behalf of plaintiff, the defendant moved for an instructed verdict, or that the case be taken from the jury on the ground that the testimony adduced on behalf of the plaintiff was not sufficient to warrant a verdict in his favor. This motion was sustained by the Court and judgment entered accordingly.

The defendant in error contends that the action of the Court was proper, for the following reasons:

(1) The letter of guarantee shown in the record is in the nature of an offer to guarantee payment of the debt of Frank Waterhouse, Limited, to the bank theretofore incurred and advances thereafter made; and the plaintiff offered no evidence tending to show that the bank within a reasonable time thereafter gave notice to the defendant that the guarantee was accepted or that the further advances would be made.

(2) The testimony shows that the indebtedness of Frank Waterhouse, Limited, to the bank was paid in full on February 15, 1907, by the plaintiff, John Gill, and there is no evidence tending to show any agreement that the payment by Gill was intended at the time it was made as a purchase of the indebtedness rather than a payment. The assignment, therefore, by the bank of the letter of guarantee of the defendant, which assignment was made in October, 1907,—eight months after the debt had been paid,—was ineffective and vested plaintiff with no right of action against this defendant. The amended complaint does not allege that the indebtedness of Frank Waterhouse, Limited, to the bank was ever assigned by the bank to the plaintiff and the assignment offered in evidence is not an assignment of the debt of the principal debtor, but an assignment of the letter of guarantee only.

(3) The indebtedness of Frank Waterhouse, Limited, to the bank, as alleged and attempted to be proven, was upon open account.

More than three years elapsed between the date of the last item of said account and the commencement of this action, and the account was, therefore, at the time of the commencement of this action barred under the laws of the State of Washington as against the principal debtor, Frank Waterhouse, Limited. The principal debt being barred and the principal debtor thereby released from his obligation to pay, the right of action of the creditor against a guarantor is also barred under the laws of the State of Washington.

(4) The plaintiff failed to prove any indebtedness of Frank Waterhouse, Limited, to The Commercial Bank of Scotland, Limited.

These questions arose during trial mainly upon objections to testimony offered by the plaintiff.

I

It is conceded by the plaintiff in error that there is no evidence in the record tending to show that the bank ever notified Waterhouse that it had accepted his letter of guarantee, or that it meant to give credit to Frank Waterhouse, Limited, on the basis thereof, or that he ever had knowledge that such credit was given subsequent to the execution of the letter of guarantee,

until October 31, 1906, more than seven years thereafter, when the bank suddenly made demand upon him for the payment of the indebtedness.

The letter of guarantee was addressed as follows:

"To THE COMMERCIAL BANK OF SCOTLAND, LIMITED,

I, Frank Waterhouse, Tacoma, Washington, United States, America, hereby guarantee you payment of all sums for which Frank Waterhouse, Limited, etc."

The letter of guarantee closes:

"IN WITNESS WHEREOF, These presents are subscribed by me at London on the sixteenth day of February eighteen hundred ninety-nine before these witnesses: Andrew Whitlie, Manager, and William Bamford Lang, Accountant, both of your branch there.

(Signed) FRANK WATERHOUSE.

(Signed) AND. WHITLIE,

Witness,

(Signed) W. B. LANG,

Witness."

The letter contains no recital of any consideration moving between any of the parties, nor of any relationship of defendant to the principal debtor. So far as appears from the face of the instrument, it is a voluntary offer by Waterhouse to guarantee the payment of the past and future debts of Frank Waterhouse, Limited, to the extent and upon the conditions mentioned in the letter. The offer did not cover all indebtedness that had been or might be thereafter incurred with the bank by the principal debtor, but was limited

to £21,000 in amount and to "an account or accounts kept in their name in your books and operated on for them by cheques or drafts signed by two of their directors and their secretary, all for the time, or on bills, promissory notes or other obligations." The indebtedness claimed in this action was upon accounts, and the offer of guarantee therefore was limited to such accounts as were operated on by checks or drafts signed by two of the directors and the secretary of Frank Waterhouse, Limited. There is no evidence whatever in the record bearing upon this guarantee or the action of the bank with reference thereto, except the admission in the answer of defendant that he executed such an instrument in February, 1899, and the testimony showing that the bank, in October, 1907, undertook to assign the letter to the plaintiff.

While there is some conflict in the state decisions, the rule is thoroughly settled by the United States Supreme Court that a letter of guarantee addressed to a particular person, particularly when it contemplates future credit, does not become a contract and binding upon the guarantor until accepted by the party giving credit and notice thereof given to the guarantor within a reasonable time thereafter.

Russell vs. Day, 7 Cranch 69.

Edmondson vs. Drake, 5 Peters 624.

Douglass vs. Reynolds, 7 Peters 113.

Lee vs. Dick, 10 Peters 482.

Adams vs. Jones, 12 Peters 207.

Louisville Mfg. Co. vs. Welch, 10 How. 461.

Davis vs. Wells, 104 U. S. 159.

Sewing Machine Co. vs. Richards, 115 U. S. 524.

In *Adams vs. Jones*, *supra*, the rule is stated as follows:

“And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this Court, after the decisions which have been made in *Russell vs. Clarke*, etc. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility.”

In the case of *Louisville Mfg. Co. vs. Welch*, *supra*, the Court said:

“The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this Court, according to all the cases; *it is deemed essential to an inception of the contract;*”

Again, in the case of *Davis vs. Wells*, *supra*, the Court said of this rule:

“In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this Court.”

This is also the rule prevailing in the large majority of the states.

12 Ruling Case Law, pp. 1068-1069.

The letter of guarantee in the case at bar was addressed to the bank and was signed by the defendant in the presence of the Manager and Accountant of the bank. This fact constitutes all of the evidence there is in the record showing or tending to show that there was ever any agreement or assent upon the part of the bank to the guarantee, or that it ever in any way bound itself to make any future advances thereon. No notice of acceptance by the bank or of any advances made thereon was ever given to the defendant. The plaintiff alleges in his amended complaint that:

“the said Frank Waterhouse, Limited, and the said Frank Waterhouse were desirous of obtaining from the said The Commercial Bank of Scot-

land, Limited, certain further advances to be made to the said Frank Waterhouse, Limited; and thereupon said The Commercial Bank of Scotland, Limited, agreed to make such further advances to the said Frank Waterhouse, Limited, upon being guaranteed by the said defendant the payment by the said Frank Waterhouse, Limited, of advances theretofore made to the said Frank Waterhouse, Limited, and thereafter to be made to the said Frank Waterhouse, Limited, up to a sum not to exceed twenty-one thousand pounds sterling (£21,000); and thereupon and in consideration thereof the said Frank Waterhouse did then and there make, execute and deliver to the said The Commercial Bank of Scotland, Limited, his certain Letter of Guarantee."

It will thus be seen that the issue tendered by the complaint was an agreement upon the part of the bank to make further advances to Frank Waterhouse, Limited, if defendant would guarantee payment of both past and future advances, and the acceptance of those terms by the defendant and the execution of the letter of guarantee in consummation thereof. The plaintiff wholly failed to prove the agreement alleged in the complaint. The only fact appearing in the record is the fact that the defendant did execute a letter of guarantee in the form set out in the complaint; but there was an utter failure of proof of any agreement on the part of the bank to make further advances if the letter of guarantee was executed. The letter of guarantee on its face is unilateral. It is clearly nothing more than a tender of a guarantee which would not become a con-

tract unless accepted by the bank and notice of acceptance given to the defendant. It is one which is continuous in its nature and contemplates future credit to be extended to the principal debtor. In such cases the reasons given by the Supreme Court why notice of acceptance should be given to the guarantor are particularly applicable. While there is some conflict in the state decisions upon the general rule of necessity of giving notice of acceptance, it seems to be universally held, even in the State Courts, that notice of acceptance and of the extension of further credit must be given seasonably by the creditor to the guarantor before he is bound upon a letter of guarantee continuous in its nature, and covering future credits to the principal debtor.

12 Ruling Case Law, p. 1069, sec. 19, and cases cited (n. 16).

Plaintiff in error contends in his brief that the rule above mentioned does not apply to an absolute guarantee of payment. That contention, manifestly, is inconsistent with the decisions of the Supreme Court above cited. The guarantee involved in the case of *Lee vs. Dick* was an absolute guarantee, and the rule that notice of acceptance must be seasonably given was affirmed in that case.

Also, in *Louisville Mfg. Co. vs. Welch*, 10 How., the guarantee was an absolute guarantee of payment,

and the Court held that this notice of acceptance by the party guaranteed was essential to the inception of the contract.

The guarantee in *Davis vs. Wells*, 104 U. S., was also an absolute guarantee of payment. The Court held that notice of acceptance in that case was not necessary because the guarantee on its face recited the receipt of a consideration to the guarantor from the party guaranteed, and held that that fact showed a consummated contract. The guaranty in *Sew. Mch. Co. vs. Richards*, 115 U. S. 524, was absolute and the rule requiring notice of acceptance was applied.

Of course, if the creditor offers to extend the credit on condition that the guarantee is given, and the guarantee is thereupon given, it constitutes a completed contract because it is the acceptance by the guarantor of an offer made by the party guaranteed and constitutes a meeting of their minds.

In the case at bar, however, there is absolutely no proof whatever that the bank ever offered to extend future credit if the guarantee was given, nor is there anything in the record showing any consideration passing between the creditor and the guarantor to induce the execution of the letter of guarantee. So far as the record shows, the defendant signed this letter of guarantee addressed to the bank, without any previous negotiations with the bank, or any agree-

ment upon its part to make any advances, and was not seasonably notified by the bank that it accepted the guarantee or would make or had made additional advances in reliance thereon. The fair interpretation of the offer of defendant contained in the letter of guarantee is that he will guarantee payment of past indebtedness of, and of future advances to, Frank Waterhouse, Limited, if the bank will make such future advances. The bank never at any time signified to the guarantor its acceptance of or assent to this offer.

The plaintiff in error, however, further contends that the defendant at the time of the execution of the letter of guarantee was a stockholder and director of Frank Waterhouse, Limited, and therefore interested in the securing of credit for that company, and that, therefore, no notice of acceptance of his offer was necessary. Citing *Doud vs. Bank*, 54 Fed. 846. In that case the guarantee recited on its face that the Sheffield Bank (the principal debtor) desired to establish credit with the National Park Bank whereby it might obtain advances, loans or discounts from said bank, and "therefore, the undersigned, being five in number and stockholders and directors of the bank first above named, to-wit, * * * in consideration of one dollar to each of them in hand paid, the receipt whereof is hereby acknowledged, and the said loans,

discounts or other advances to be made, do hereby jointly and severally guarantee, etc.” The guarantee showed on its face that the Sheffield Bank had requested these advances from the Park Bank and in view thereof these stockholders and officers of the bank, in consideration of the one dollar paid them and of the loans and discounts to be made, guaranteed payment of such loans and discounts.

The Court manifestly construed the recitals of the written instrument as showing a consideration moving between the guarantor and the guarantee. It is based upon the ruling in *Davis vs. Wells, supra*, where the Court held that the recital in the guaranty of even a nominal consideration passing between the guarantor and the guarantee was sufficient to show a consummated contract.

The same rule was applied in the Ruffler case, 239 U. S. 17, where the Court held that putting the guarantee in the form of a sealed instrument such as a bond, imported a consideration paid by the obligee to the obligor, and therefore evidenced a completed contract. As stated above, there is nothing in the letter of guarantee in the case at bar evidencing any consideration passing between the guarantor and the guarantee, nor any interest of the guarantor in the debtor corporation. One of the witnesses, Mr. McEwen, does state that Frank Waterhouse, Limited,

was incorporated in December, 1897, and that the defendant was one of the original shareholders. There is no testimony, however, that the defendant was a shareholder in 1899, when the guarantee purports to have been executed, unless a presumption arises that he continued to be such.

In the Doud case the directors who signed the guarantee were in charge and control of the debtor company and necessarily knew of the advances made by the creditor to the debtor at the time that they were made. In the case at bar the debtor company was located in London, as was the creditor bank, while the defendant was a resident of the State of Washington, and presumably without knowledge of any advances made by the bank to the debtor company.

The argument of plaintiff in error fails to distinguish between two distinct elements of a contract, that is, the mutual assent of the parties as one element, and consideration sufficient to uphold the contract when made as another element. If, in fact, the defendant at the time he executed the letter of guarantee was a stockholder in Frank Waterhouse, Limited, that interest might be sufficient consideration to give binding force to the contract of guaranty when completed; but it has no tendency whatever to prove that the bank accepted or assented to the guarantee and agreed to make the further advances. Where the

letter of guarantee recites a consideration passing from the party guaranteed to the guarantor, this recital is, as held in the case of *Davis vs. Wells, supra*, evidence of the assent of the party guaranteed and of the consummation of the contract. On the other hand, even though the letter of guarantee recites that it is executed for a valuable consideration, that recital is no evidence of the assent on the part of the party guaranteed unless it further shows that the consideration moved from the party guaranteed to the guarantor. This was illustrated in the case of *Davis Sewing Mch. Co. vs. Richards, supra*. In that case the guarantee read:

“For value received, we hereby guarantee to the Davis Sewing Machine Co. of Water town, New York, the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness, etc.”

The Court held that this was an offer of guarantee and that before recovery could be had thereon it must be proven that the party guaranteed gave seasonable notice of acceptance of the guarantee. The Court used this language:

“There is no evidence of any request from the plaintiff corporation to the guarantors or of any consideration moving from it and received or acknowledged by them at the time of their signing the guarantee. The general words at the beginning of the guarantee “Value received” without stating from whom, are quite as consistent with

a consideration received by the guarantors from the principal debtor only.”

This language can be well applied to the record in this case. There is no evidence of any request from the bank to the defendant to give a guarantee, or of any consideration moving from the bank and received or acknowledged by the defendant at the time he signed the guarantee. Any interest the guarantor may have had as stockholder in the principal debtor would have no tendency whatever to show an assent of the bank to accept the guarantee and make advances under it.

II

Among the grounds which moved the District Court to grant a non-suit was this—the District Judge was convinced that the debt of Frank Waterhouse, Limited, to the bank was extinguished by the payment of the amount thereof made by John Gill on February 15th, 1907, and that such was the intent of the parties to the transaction. A consideration of all of the facts relating to the transaction will show how entirely correct the conclusion was.

On February 16th, 1899, defendant in error, Alexander McNab, John M. Mitchell, John Marshall, John McNab, Bruce Archibald, O. J. Trinder and Charles Richardson held all of the stock of Frank Waterhouse, Limited, hereinafter referred to as the English company (Record page 37). On that day the English

company was indebted to the bank on the general account of £1,025:11:11 (Record page 98), upon the loan account, £15,000, and upon the No. 2 account, £5,000. On that date the defendant in error executed the guaranty which is sued upon in this action (Record page 4). At the same time the other shareholders, except Trinder and Richardson, executed to the bank like guaranties (Record pages 32 and 45). On October 6th, 1900, the English company had a credit balance at the bank on the general account of about £400 (Record page 101). The loan account and the No. 2 account stood unchanged. On that day the defendant in error entered into the agreement with the English company which is set out at page 126 of the Record, under the terms of which the defendant in error agreed to incorporate an American company, and the American company to purchase from the English company all the assets of the company for \$230,000, \$50,000 cash, balance in ten equal semi-annual payments, the deferred payments to be evidenced by bonds secured by mortgage, the American company to assume all the American indebtedness of the English company, but none of the English indebtedness, except the account of Trinder, Anderson & Co. Waterhouse surrendered all further interest in the English company. The English company was to forthwith cease doing business and appropriate the said purchase price to pay the English indebtedness. Thereupon the English com-

pany ceased active business (Record page 38). Alexander McNab was informed of and a party to the transaction (Record page 39). The only officials of the bank whose depositions were taken by the plaintiff in error were unwilling to admit, but did not deny, that the bank was cognizant of this agreement (Record pages 33, 47 and 77). The secretary of the English company testified that nothing was withheld from the bank (Record page 39). After that agreement was made numerous advances were made by the bank to the English company on the general account, aggregating £16,109:15:10 (Record pages 101-104), and on the No. 2 account £221:0:12 (Record page 106), and in these two accounts after that date the English company deposited in the bank more than enough money to pay the amounts due on the general account at the time the agreement was entered into (Record pages 101-104 and 106), and nearly half enough to pay the debit balance on that date on account No. 2. After that date no demand was made by the bank upon the defendant in error until October 31st, 1906 (Record page 90). On February 15th, 1907, John Gill, who was Alexander McNab's solicitor (Record page 28), paid the bank the amounts then owing to it by the English company, and each of the three accounts was closed upon the books of the bank by entries under that date of that payment as follows: "By cash, paid by Mr. John Gill" (Record pages

104, 105 and 107). The several witnesses testified that on that date the said John Gill paid the bank the amount of the indebtedness owing to it by the English company (Record pages 23, 30, 43 and 48). John Gill never received from the bank any assignment or other document in evidence of or relating to the transaction until on October 8th, 1907 (eight months later), the bank gave him the assignment of the letter of guaranty of the defendant in error and of the bank's claim against the defendant in error (Record page 91). Gill never did receive any assignment of the bank's claim against the English company (Record page 26), in respect of which fact the allegation of the amended complaint is significant (Record page 7, paragraph 10). There is no suggestion in the Record that the principal debtor, the English company, participated in any way in or had even knowledge of the transaction at the time it occurred (Record page 48). The assignment of the claim against defendant in error to Gill was negotiated and effected by the head office of the bank in Edinburgh (Record page 48). The bank never did execute to Gill any assignment of any of the other guaranties (Record pages 25, 32 and 33), but the other guaranties were delivered over by the bank to said Gill (Record pages 25, 32 and 33). No attempt was ever made to enforce any of these other guaranties, though one of the executors of the will of said Gill (Record page 24) volun-

teered the statement that the executors reserve "any right competent to them in the event of their not recovering the whole of the debt under this suit to obtain from the Commercial Bank of Scotland, Ltd., an assignation or assignations to the guarantees granted by the said Alexander McNab and others and recover from them." (Record page 28.)

Gill is said to have made this payment to the bank at the request of his friend Alexander McNab. That the transaction was a payment, as the District Court viewed it—not a purchase, as claimed by the plaintiff in error—is demonstrated by the fact that afterwards McNab made a payment to Gill on account of the transaction, £397 on account of principal and £778 on account of interest (Record pages 27 and 28).

That the defendant in error contended that the indebtedness of the English company to the bank had been paid, was well known to the plaintiff in error long before the depositions were taken in England and Scotland, for it was so alleged in the answer (Record page 12). Nevertheless, plaintiff in error examined none of the officers of the bank who personally had the transaction with Gill. The witnesses whom the plaintiff in error did examine, though having no personal knowledge of the matter, yet undertook to testify in an evasive way in regard to it from hearsay or

guess, and it is that sort of testimony to which plaintiff in error refers in his brief.

On these facts the District Judge said in ruling upon the motion for a non-suit (Record page 51):

“And upon the other question of payment, I am convinced in my own mind, taking the conduct of the parties as disclosed by the evidence, that the payment when it was made in February was payment. I in my own mind believe that the assignment was an after-thought. The relation of Mr. McNab, who appears to be one of the guarantors to the extent of £21,000, the same amount for which Mr. Waterhouse became a guarantor and I think perhaps in the same accounts, the three different accounts, the testimony of Mr. Anderson discloses that this was paid by Mr. Gill, and I think the testimony likewise discloses either on the part of Mr. Gill or the testimony of Mr. Anderson that this was paid upon the suggestion of Mr. McNab. Now, Mr. McNab was the attorney—Mr. McNab was a client of Mr. Gill. Mr. McEwen in his testimony on cross-examination identifies a contract between the defendant Waterhouse Company, Incorporated, of which Mr. McNab was one of the stockholders, in which this indebtedness was to be taken care of, and when we take all of these things into consideration, the motive that would prompt Mr. McNab, the testimony of the witnesses who testify with relation to the payment and the circumstances surrounding the payment as made, the disclosure of the witnesses’ ignorance of the things which actually did take place, and the testimony simply directed to the things which affirmatively appear on the Record, and then the absence of the testimony on the part of the bank from persons who know as to what was actually done and the intention of the parties, and then the assignation as it

is called which was executed in October following, eight months after the payment was made as recorded in the books of the bank, and the testimony of Anderson, who seems to be advised and states that the bank afterwards granted the assignation, when we take all thees things into consideration, I am in my own mind convinced that the payment, when it was made by Gill, was made on behalf of these other parties upon whom the obligation rested, and it was not at that time with any intention of granting an assignment, and this is further confirmed by the testimony that no assignment was made and taken from the bank of McNab and of these other parties. The only assignment that was made was simply the assignment of Waterhouse."

The order of dismissal is as follows:

"and the Court, after due consideration, being of the opinion that the evidence submitted to the jury is not sufficient to justify a verdict in favor of plaintiff and against the defendant herein, etc." (Record page 19.)

In so ruling the District Judge conformed to the established practice of the Federal Courts. We understand it to be the established law that it is the duty of the Court, at the close of the evidence, to direct a verdict for the party who is clearly entitled to recover, where the evidence is such that it would be its duty to set aside a verdict in favor of his opponent if one were rendered.

Motey vs. Pickle Marble & Granite Co. (C. C. A., 8th Cir.), 74 Fed. 155.

People's Bank vs. Aetna Ins. Co. (C. C. A., 4th Cir.), 74 Fed. 508.

And this ruling applies equally where the motion is for a non-suit at the close of the plaintiff's case.

Coughran vs. Bigelow, 164 U. S. 301.

Slocum vs. Insurance Company, 228 U. S. 364.

Oscanyan vs. Arms Co., 103 U. S. 261.

In *Patton vs. Railway Company*, 179 U. S. 658, the Court, in confirming the ruling above stated, said:

"Hence it is that seldom an Appellate Court reverses the action of a Trial Court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noticing all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect an Appellate Court will pay large respect to his judgment."

And in *Sloss Company vs. Railway Company* (C. C. A., 4th Cir.), 85 Fed. 133, the Court said (page 138):

"If the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury. *Pleasants vs. Fant*, 22 Wall. 122; *People's Bank vs. Aetna Ins Co.*, 20 C. C. A. 630, 74 Fed. 507. This is

a well-established rule in the Federal Court. It is essentially different from the rule in the courts of many of the states, but is uniform in the courts of the United States; and it has been decided by this Court that section 914, Rev. St., does not require the Federal Courts to change this rule of procedure so as to conform to the practice existing in the courts of the states. The action of the Circuit Judge, who presided at the trial of this case, in ordering that the defendant have judgment of non-suit, was in conformity with the decisions of the Supreme Court of the United States and the decisions of this Court."

This Court has announced the same rule in *Shoup vs. Marks* (C. C. A., 9th Cir.), 128 Fed. 32, saying, at page 37:

"The Trial Court may direct a verdict in any case where the evidence is of such conclusive character that the Court, in the exercise of sound, judicial discretion, would be compelled to set aside a verdict in opposition to it."

The only testimony upon which the plaintiff in error relies to establish that the payment by Gill was not a payment to extinguish the debt of the English company was that of witnesses who were not present at or parties to the transaction and who have and could have no knowledge of their own on the subject, and whose testimony is either a guess on their part or the rankest kind of hearsay. Plaintiff in error claims that hearsay evidence was rendered competent because of the form of the stipulation under which the depositions were taken. To this we do not agree,

but nevertheless we regard that circumstance as immaterial, for the reason that under the rule which obtains in the Federal Courts, above set forth, the District Court would not have been satisfied to have allowed a verdict to stand against the defendant in error, the only support of which verdict was hearsay evidence on so material a point.

The case presented upon the facts is a perfect case of voluntary payment by a stranger of a debt due, upon which debt the defendant sued stood in the relation of a surety only. The case comes within the principle of law laid down in *Inhabitants of South Scituate vs. Inhabitants of Hanover*, 9 Gray 420, in which the Court announced the rule in these words:

“It was a voluntary payment by the plaintiffs of a debt due from the defendants. Such payment gives no cause of action. It falls within the well settled rule of law, that the payment of the debt of another raises no assumpsit against the person whose debt is paid, and no action will lie by reason of such payment, unless a request, either express or implied, to make the payment is proved. The law does not permit the liability of a party for a debt to one person to be shifted so as to make him debtor to another without his consent.”

The language of the Supreme Court of New Mexico in *Lee vs. Field*, 54 Pac. 873, upon the point is:

“The bank therefore was a stranger, a mere volunteer, when it paid the note; and unless there was some agreement, express or implied, to pur-

chase the note, the payment operated to extinguish it."

This rule is expressly recognized in the brief of the plaintiff in error.

If it is sought to characterize Gill as not a volunteer, on the theory that he acted at the request of McNab, the answer is, that he was nevertheless, as to the defendant in error and as to the principal debtor, a volunteer, but if it were otherwise and Gill is to stand in the shoes of McNab, it is to be remembered that McNab could not sue the defendant in error upon the guaranty, but only for contribution, which would be a different cause of action than that herein involved.

The Montana case of *Penwell vs. Flickinger*, 129 Pac. 324, is in point. The defendants had agreed to sell the Beaverhead Ranch Company a certain automobile at the price of \$956.50, and the Ranch Company paid them the price in full. They never delivered the automobile, nor returned the price. The plaintiff had recommended that the Ranch Company make the purchase, and feeling morally responsible, the plaintiff paid to the Ranch Company the said amount on August 6th, 1910. Plaintiff then sued the defendants to recover the amount of money which he had so paid the Ranch Company. After the suit was brought, and in January, 1911, the plaintiff procured from the Ranch Company an assignment of its demand against the de-

fendant. The Court held that the action could not be maintained for the reason that the payment made had extinguished the obligation and it could not be revived by the subsequent assignment. The Court said:

“He (plaintiff) was under no legal obligation to make good the default of the appellants (defendants), and that he did so without their authorization, are facts patent upon the face of the record. Equally certain it is that there was no subsequent ratification or promise to repay, and there is not a suggestion in the record of any oral assignment of its claim from the company to the respondent (plaintiff) when he made the payment, or of any understanding that it should be assigned or kept on foot for his benefit. Under such circumstances the general rule is that the payment extinguishes the debt, at least so far as the creditor is concerned.”

The court held that the assignment had no force or effect because the original payment had extinguished the obligation, and it could not be revived by the assignment.

The case of *Moran vs. Daniel Abbey et al and Phillip Heffner*, 63 Cal. 56, is directly in point. Abbey had given Hancock his promissory note, on which note Heffner was a surety. Hancock placed the note in the bank for collection. After maturity of the note, at the request of Abbey, Moran paid the bank the amount of the note, going to the bank with Abbey for that purpose, and the bank delivered the note to Moran. Moran put the note in his safe, kept it there for three years,

then went to Hancock, and got Hancock to endorse it without recourse. He then sued Abbey and Heffner upon the note. It is true that Moran and Hancock were as to that transaction strangers to each other, a fact which only served to establish beyond all possibility of contradiction that there was no sale intended, but the rule would not have been different had payment been made direct to Hancock and he had delivered over the note. In reference to the subsequent transfer by endorsement, the Court said:

“But payment of a promissory note is not a contract; it is performance of the obligation arising out of the promise to pay. Any one of the several parties to a joint contract, or anyone in his behalf and at his request, or with his consent, may perform the obligation; and when performance has been offered or made, and the money accepted, the obligation becomes extinguished. The parties to the contract are no longer bound to each other by the *vinculum legis* of right and duty. The duty being discharged the right ceases to exist; and the contract itself, though preserved in form, is no longer the subject of sale or transfer. When therefore the plaintiff, at the request of Abbey and for his benefit, took up the note, the contract was discharged, and the qualified indorsement of it by the payee, three years afterwards, was ineffectual as a transfer. The verdict of the jury was therefore according to the evidence and the law.”

The judgment in favor of the defendant Heffner was affirmed.

It is to be remembered that in that case, as in the case at bar, the man who made the payment knew that

the person he was attempting to enforce the obligation against was surety only. The rule for which we are contending is much stronger when the debt which is paid, is after payment sought to be enforced against the surety.

Counsel for plaintiff in error deny the applicability of the Moran-Abbey case, on the ground that the payee of the note and the person paying it off did not personally meet in the transaction, but that criticism does not apply to the Montana case, for in that case those parties did meet personally in the transaction. At the same time, counsel for plaintiff in error criticise the Montana case because it appeared in that case that one of the debtors objected to the payment being made. The circumstance in no way influenced the decision of the Montana Court, for the Court in its opinion gives importance only to the fact that the debtors did not give *their consent*.

The case of *Day vs. Humphrey*, 79 Ill. 452, is not subject to any of the criticisms made by counsel for the plaintiff in error herein. In that case one Humphrey and one Hinckley gave their note to the cashier of the First National Bank of Galesburg, Hinckley being surety only thereon. Humphrey applied to Day (as did McNab to Gill) for the money to take up the note. Day and Humphrey went to the bank and Day gave the bank his check for the face of the note, and

Humphrey paid the interest, and the cashier surrendered the note to them. Prior to the meeting at the bank nothing had been said between Day and Humphrey as to what security, if any, Humphrey was to give Day. At the bank Humphrey proposed to give Day his note, but Day said the old note was good enough. After the cashier had passed the note over the counter to them, Day suggested that the bank endorse the note without recourse, which it did. Thereafter Day sued Humphrey and Hinckley on the note. The Court in affirming the judgment of the lower Court in favor of Humphrey said:

“While the evidence is slightly conflicting, we think it greatly preponderates in favor of the proposition that the legal effect of what the parties did was the payment of the note to the bank. There is no pretense the bank ever sold the note to plaintiff. The idea of indorsing the note was suggested after it had been passed over the counter to the parties, as having been paid. It was returned to the bank, after some consultation between them, to be indorsed to plaintiff.

The note may have been good, as against Humphrey, in the hands of plaintiff, but as to Hinckley it is different. He was not present, and consented to no arrangement about the matter. As to how the note was paid, Humphrey states, in his testimony, the note was not indorsed in his presence, but the cashier of the bank thinks it was. Conceding the note was indorsed exactly as the cashier says it was, the arrangement could not bind Hinckley, who was a mere security, and was not present, consenting to it. The \$200 paid to the bank to take up the note, was, in fact, a loan by plaintiff to Humphrey, to be repaid on the first

of the ensuing April. The conduct of the parties is inconsistent with any other theory of the case. The note was taken up on the 10th of December, 1870, but it was never presented to Hinckley for payment until 1874, and in the meantime Humphrey had become insolvent. The contest in the case is between the security for Humphrey and his creditor, and the facts proven raise no equities in favor of the latter as against the former."

The similarity of the Illinois case to the case at bar is remarkable in several further aspects, to-wit, the surety was not present at the time of the payment, nor consented to any arrangement about the matter. The money paid to take up the note was in fact a loan to one of the parties to the note. In this case the party was a co-surety (co-guarantor), and that the money was a loan to him is proven by the fact that he subsequently repaid a part of it. In the Illinois case the payment was made in 1870. No demand was ever made to the surety until four years later, and in the meantime the principal debtor had become insolvent. In the case at bar the action against the surety (guarantor) was brought about one year after the payment, and the principal debtor had in the meantime become insolvent. The assignment in both cases was made after the payment had been made—in the Illinois case, a few minutes; in the case at bar, eight months after. The case at bar is stronger than the Illinois case in the circumstance that here the principal debtor was not present at and did not participate in or know of the transaction.

Another circumstance which makes the case at bar much stronger for the defendant in error than any of the cases cited is the fact that the assignment when made did not purport to be an assignment of the debt of the principal debtor—Frank Waterhouse, Ltd., and the bank has never assigned the debt of the principal debtor to anyone. To illustrate the force of this point, let us suppose that in the Illinois case the note had been delivered up, as it was, and later the bank had executed and delivered to Day an assignment of its one-time cause of action on the note against the surety, but had not even attempted to assign its cause of action against the principal debtor. Would there be any hesitation in deciding that as to the surety the debt for which he was surety had been paid and extinguished?

In this connection, it is of importance to consider what right of contribution, if any, the defendant in error would have if judgment in this case should go against him and he should pay the same. In such event, if he were to sue his co-guarantor Mitchell, for example, Mitchell could successfully defend on the fact that a stranger had paid the debt for which he was guarantor, without attempting to keep the debt alive as against the principal debtor and without attempting to keep his guaranty alive. Therefore, in Mitchell's case payment by Gill would necessarily be held to have extinguished the debt and his liability as guarantor.

III

There was another ground presented to the Court in support of the motion for a non-suit, to which the Court made no reference in the opinion rendered upon the motion. That ground is, that upon the facts proven, the action was barred by the statutes of limitations of Washington. Those statutes, so far as they are pertinent to this case, are (Remington's Codes and Statutes of Washington):

(Section 157) Within six years—

2. An action upon a contract in writing, or liability express or implied arising out of a written agreement.

(Section 159) Within three years—

3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument.

(Section 166)—

In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item provided in the account on either side.

Both of these statute were set up as affirmative defenses in the answer.

THE ACCOUNT IN QUESTION IS NOT A
MUTUAL, OPEN AND CURRENT
ACCOUNT

Held by the Supreme Court of South Dakota in *McArthur vs. McCoy*, 112 N. W. 155, under a statute identical with the Washington Section 166:

“Where the items of account are all on one side, as between a shopkeeper and his customer, and where goods are charged and payments credited, there is no mutuality, and the statute bars the account. * * * To constitute mutual accounts, there must be mutual demands. Each party must have a demand or right of action against the other.”

In *Bank vs. Butnett* (Cal.), 58 Pac. 85, the account was that of a bank against a customer. The Court said:

“The account shows no transactions except receipts and disbursements of money by the bank. * * * We can discover no elements of a mutual, open, and current account in the transaction.”

And in the California case of *Flynn vs. Seale*, 84 Pac. 263, the Court said:

“A mutual account implies a reciprocity of dealing between the parties to the account, and is made up of matters of set-off wherein each party has a right of action against the other.”

See also *In re Hiscock's Estate* (Mich.), 44 N. W. 947.

CREDIT ENTRIES ON THE BANK'S BOOKS OF
PAYMENTS ARE NOT EVIDENCE OF
PARTIAL PAYMENTS FOR THE PURPOSE
OF SUSPENDING THE STATUTE OF LIM-
ITATIONS

In *Schlotfeldt vs. Bull*, 18 Wash. 64, it was held:

First, that endorsements of partial payments entered upon the back of a promissory note are not evidence of the fact of payment in the absence of other competent evidence of the payments or of assent of the defendant to the endorsements, and

Second, that the same rule applies to entries of payments made in books kept by the holder of the note.

The Court's reasoning is that the endorsements were merely self-serving, and not against the pecuniary interest of the party making them, and "To allow the books to be introduced under the circumstances of this case would but permit a person to make evidence for himself." This holding is expressly affirmed in *Arthur & Co. vs. Burke*, 83 Wash. 690, at page 694.

PARTIAL PAYMENTS BY PRINCIPAL DEBTOR
DO NOT SUSPEND THE STATUTE OF LIM-
ITATIONS AS TO THE SURETY OR GUAR-
ANTOR

This is squarely held in *Stubblefield vs. McAuliff*, 20 Wash. 442, where the Court says:

“It is clear that, under the section of our statute (now Rem. §176) requiring a new promise to be in writing in order to revive or continue the obligation, one of two co-debtors could not make such promise for the other without express authority, whether the acknowledgment or promise was made before or after the statutory bar had attached; and it is equally apparent, upon principle, that the same rule controls in payments upon an existing obligation.”

This decision was accompanied by a full review of the authorities, one of them being *Bell vs Morrison*, 1 Peters 351.

In *Bassett vs. Thrall*, 21 Wash. 231, the doctrine of the *Stubblefield* case is explicitly extended to the case of payments made by a principal debtor, and there held not to suspend the statute as against the surety.

In *Perkins vs. Jennings*, 27 Wash. 145, the Court at page 153 announces that the doctrine of the *Stubblefield* case “must now be considered the settled rule of this Court.”

Later holdings of the Washington court to the same effect are *Arthur & Company vs. Burke*, 83

Wash. 690, and *Northern Commercial Company vs. Trading Co.*, 86 Wash. 589 at 593. In the first of these the Court says:

“It is also the settled law of this state, following the trend of authority in others, that in order to toll the statute of limitations, the partial payment must have been a voluntary payment made or authorized or ratified by the party against whom the payment is invoked as tolling the statute.”

By the express terms of the guaranty involved in this case, the money was payable by the guarantor upon demand. Therefore, the money was payable forthwith, and the statute of limitations would begin to run immediately upon execution of the document as to the previous advances, and from the date each subsequent advance as to such advance. *Brooks vs. Trustee Company*, 76 Wash. 589; *Douglass vs. Reynolds*, 7 Peters 113.

It has been the contention of the plaintiff in error that this case is ruled by the six year statute. While this is an erroneous contention, nevertheless, under the principles above announced, the six year statute would bar all the items in the account except those incurred within the six year period prior to the commencement of this action (which was in January, 1908). This would bar all the items in the loan account and all of the general account except £1993:13:6, and all of the No. 2 account except £221:0:12, without taking into

consideration payments made on the general and No. 2 accounts during the six year period, which as to the general account would aggregate in amount more than the advances made during the same period.

Certain it is that the three year statute applies to the principal debt and the principal debtor. The principal debt was an open account and clearly comes within the language of Section 159 of the statute. The last entry in either of the three accounts is the item in account No. 2 of an advancement on October 30th, 1903 (Record page 106). So that at the time this action was commenced in January, 1908, four years and two months at least had elapsed. The result is that the action against the principal debtor was barred by the statute of limitations of the state of Washington, and the presumption being (at this stage of the case conclusive) that the law of England is the same as the law of the state of Washington. The cause of action against the principal was also barred in England.

We then have this proposition: The cause of action against the principal debtor being barred at the time of the commencement of this action, the cause of action against the guarantor is barred.

Upon this proposition there is a conflict of decision among the several states of the Union, but in so much as the affirmative of the proposition is the settled law of the state of Washington, therefore, it is the

settled law in this Court for this case. The question first came before the Supreme Court of the state of Washington in the case of *Spokane County vs. Prescott*, 19 Wash. 418. The action was against the defaulting county treasurer of Spokane County and the sureties upon his official bond. The three year limitation was applicable to the principal debtor, but it was contended that, there being a cause of action against the principal debtor and the sureties upon the bond—a written instrument—the six-year statute was applicable. The Court held that the three-year statute was applicable as to the principal debtor, and held that the bar as to the principal debtor was a bar in favor of the sureties. The Court said at page 421:

“Manifestly, in conformity to well-recognized legal principles, no action can be maintained against the sureties unless the liability of the principal exists at the time of the commencement of the action. * * * The undertaking of the sureties was collateral security for the performance of the duties of their principal.” (Citing among other cases *State vs. Blake*, 2 Ohio St. 147).

The Court says further:

“If the bond be merely collateral security for the performance of the principal contract, and is not itself the original contract, then the question here in controversy is illustrated by reference to the rules controlling principal and suretyship. In states where a mortgage conveys the fee to the mortgagee, an action upon the mortgage is not barred, though the debt may be; but whereas in this state the mortgage creates a lien only, and is an incident to, and collateral security for, the debt, when the principal (the debt) is barred,

no action can be maintained upon the mortgage itself (the collateral security for the debt”).

The case of *Dickman vs. Stroback*, 26 Wash 558, approves the Prescott case, applying its ruling to an action against the sureties upon a guardian’s bond.

Johnson Service Co. vs. Aetna Indemnity Co., 46 Wash. 434, approves the Prescott case, applying its ruling in favor of the surety upon a bond given by a contractor for the construction of a school house.

The Prescott case was followed by Judge Rudkin in *Newberry vs. Wilkinson*, 190 Fed. 62, he saying at page 68:

“The Supreme Court of the State of Washington has held that the undertaking of the surety is collateral security for the performance of the duties of the principal, and that no action can be maintained against the surety unless the liability of the principal exists at the time of the commencement of the action (citing the Prescott case). There is no doubt a conflict of authority on this question, but: ‘No laws of the several states have been more steadfastly or more often recognized by this Court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest Court.’” (Citing *Bauserman vs. Blunt*, 147 U S. 647).

Judge Rudkin’s decision in the Newberry case was affirmed by this Court in 199 Fed. 673, the Court saying at page 683:

“This statute of non-claim, unless suspended or barred because of equitable considerations—a matter to be considered later—is effective to extinguish the liability of the principal, and, that being extinguished, there can exist none against the surety.” (Citing the Prescott case).

Since the judgment was entered in the case at bar, the Prescott case has again come before the Supreme Court of Washington. In the case of *Lindblom vs. Johnston*, 158 Pac. 972 (not yet officially reported), the Court said of the Prescott case (page 974):

“The case of *Spokane County vs. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733, relied upon by the appellant, is not contrary to the principle here announced. That was an action by the county to recover against the sureties on a treasurer’s bond for a defalcation of the treasurer after the statute had barred an action against him individually for the liability. It was sought to hold the sureties on the theory that their promise to answer for the defalcation was in writing, and that liability thereon existed for six years, which time had not then expired. The judgment was rested on the ground that there could be no recovery against the sureties unless liability existed against the principal at the time of the commencement of the action; this on the principle that their undertaking was collateral to his, and their liability ceased when his ceased. In the course of the opinion it was said that the right of action against the treasurer was not controlled by the bond, but existed independent of it, and hence the statute of limitations governing the right of action in such a case was in no way affected by the bond.”

In the case of *United States vs. Axman*, 152 Fed. 816, Judge Morrow sustained the doctrine for which

we are here contending, feeling himself obligated to do so because the Supreme Court of California had so ruled. He refers to Washington as one of the states holding the same doctrine (page 821). The action was against the sureties upon the bond of a contractor with the government.

We quote the following from the case of *State vs. Blake*, 2 Ohio St. 147, cited by our Court in the Prescott case:

"At the same time it can not be denied that such a bond is only a collateral security for the faithful performance of the official duties of the officer (*Walton vs. The United States*, 9 Wheat. 651), and that the defendants are only liable as his sureties: and as such entitled to all the rights arising from that relation, and growing out of the contract into which they have entered.

"From the first part of this proposition, it necessarily follows that the collateral obligation can exist no longer than the liability it was created to secure, while, upon the last, the universally acknowledged doctrine is, that 'it is of the essence of the contract of suretyship, that there be a subsisting valid obligation of a principal debtor. Without a principal there can be no accessory, and by the extinction of the liability of the former, the latter becomes extinct.' *Russell vs. Faylor*, 1 Ohio St. 329; *Burge on Sur.* 3; *Theo. on Prin. and Sur.* 2.

"Whatever, therefore, amounts to a good defense to the original liability of the principal, is a good defense for the sureties when sued upon the collateral undertaking. *Couch vs. Waring*, 9 Conn. 261.

"Otherwise, the principal would be indirectly deprived of the benefit of a valid defense against

the creditor, by being compelled, in effect, to respond through his sureties; or the sureties would be deprived of their right to reimbursement from the principal, and thus one or the other would be compelled to lose the rights which the law had secured to them."

The reasoning in support of the rule is well stated in the concurring opinion of Judge Ellis in *Mulvane vs. Sedgley* (Kan.), 64 Pac. 1038, at 1041.

The Auchampaugh case (Ia.) 27 N W. 805, quoted by Judge Ellis in the Kansas case, has this peculiarity. The action was barred as to the principal, but not as to the surety because of the change of residence of the surety from one state to another pending the statutory period, so that, unless the surety could avail himself of his principal's rights under the statute of limitations, he could not avail himself of the statute at all.

So it is entirely clear that the non-suit was properly granted because of the defense of the statutes of limitations, interposed in the answer.

In the brief of the plaintiff in error an assignment of error is made, though the matter is not discussed in the brief, upon the ruling of the Court excluding from evidence the Act of Parliament. This ruling of the Court was correct for the reason that the Act was one establishing a rule of evidence, and therefore could have no extra-territorial effect.

Scudder vs. Bank, 91 U. S. 406.

Clark vs. Eltinge, 38 Wash. 376.

Jones vs. Chicago, (Minn.) 83 N. W. 447.

IV

PROOF OF DEBT

In order to prove the alleged indebtedness of Frank Waterhouse, Limited, to the bank, the plaintiff in error offered in evidence two accounts purporting to be taken from the books of the bank, one copy being the account attached to the Gill assignment (Exhibit D, Transcript), and the other being the account referred to by the witness McEwen, as attached to the deposition of one Coutts (Exhibit E, Transcript), this latter deposition never having been offered in evidence. The offer of the first account is shown on page 31 of Transcript, and of the second account on page 40. The defendant objected to these accounts "because not proper evidence, and incompetent, irrelevant and immaterial, no proof books correctly kept or that the entries were contemporaneous with the transactions, or of the person making them that they were correctly made, or that such person had any knowledge of the transactions, or that the books were the books of the bank or current books kept in the ordinary current business of the bank, and upon the further ground that the witness had no personal knowledge of the transactions, and therefore his testimony is hearsay." (Tr. p 40).

The Court reserved its ruling on these objections until the plaintiff completed his case, and then sustained the objections and excluded the accounts. These rulings are covered by Assignments of Error Numbers III and VIII.

These advances by Frank Waterhouse, Limited, are claimed to have been made upon the checks of Frank Waterhouse, Limited, signed by two of the directors and the secretary of that company. The checks drawn upon the larger account, called the "Loan Account," are said to be still in the possession of the bank. (Tr. p 44). The checks alleged to have been drawn upon the "General Account" and "Number 2 Account" are said to be in the possession of the witness McEwen. None of these checks were produced at the trial or before the Commissioner taking the depositions, nor were the books of accounts themselves produced either at the trial or before the Commissioner. Instead thereof, these two accounts were produced before the Commissioner and offered in evidence at the trial.

Neither the witness Gill nor the witness Anderson claimed to have any knowledge whatever of the correctness of these accounts. The witness McEwen became secretary of Frank Waterhouse, Limited, in August, 1898. The account referred to by him is "Exhibit E" in the record. The principal account,

known as the "Loan Account," was opened March 18, 1898, and the balance due thereon in August amounted to £13,350. During September and October of that year additional advances of £1,650 were made upon the "Loan Account," making a total of £15,000. On the account called "Number 2 Account," the first advance was made June 20, 1898, of £5,000, and the principal other advance made upon that account was on August 12, 1898—£400. The third account, found on page 113 of the Transcript, was opened May 6, 1901, by a credit of £700, the principal of which was repaid March 1, 1902, leaving a debit balance of interest on that account of £11. McEwen specifically states that prior to August, 1898, he had no relations with Frank Waterhouse, Limited. With respect to the account, "Exhibit E," the witness testified:

"I have examined the copy of the accounts of Frank Waterhouse, Ltd., with the Commercial Bank of Scotland, Ltd., appended to the deposition of George Sutherland Coutts, taken on the 17th December, 1913, and I am satisfied that said accounts correctly set forth the amount advanced to said Frank Waterhouse, Ltd. The amounts due by Frank Waterhouse, Ltd., to the Bank at 31st October, 1903, were as follows: (1) On the current or general account £1151.17.9. (2) On the loan account £15,000, and (3) on No. 2 account £3,479.13.3 These amount in all, with interest to February 15, 1907, to £22,897.16.5" (Tr. p 35).

This answer of the witness was objected to by the defendant on the ground that it was hearsay, was

not the best evidence of the transactions, was not the proper way to prove book entries, neither the books nor said account therein having been proved. This objection was sustained by the Court, and this ruling is the fifth Assignment of Error.

The witness further testified that he is the liquidator of Frank Waterhouse, Limited, and that he had in his possession the checks drawn on the current or general account and Number 2 account, but could not part with them; that he had compared them with the copy of the accounts referred to and they agreed with the figures stated in that account. As stated above, the current or general account as shown on page 113 of the Transcript consisted only of a credit under date of March 6, 1901, of £700, and a debit under date of March 1, 1902, of £700, and some charges of interest which would not be represented by any check. It appears, therefore, that there were no checks drawn upon this account. The debit item under date of March 1, 1902, as shown on the account is as follows: "To C/A £700." We do not know what the "C/A" signifies. Apparently, it is not a check.

The advances made on the No. 2 Account (p. 109 Tr.) were made in the main prior to the time the witness became connected with Frank Waterhouse, Ltd. The other account, being the one attached to the assignment to Gill, is Exhibit "D" of the Tran-

script. With respect to this account, witness Lang testified that he was accountant in the London office of the bank from 1894 to 1911. He does not explain what his duties as accountant were. He had a general recollection that Frank Waterhouse, Limited, did some business with the bank. The books of the bank were not before him at the time he gave his testimony. He stated, however, that the copy of the account attached to the Gill assignment "had been excerpted from the books of the bank" and had been docqueted by him as correct. (Tr. pp. 41-42). He further testified that the accounts on the books of the bank were kept by ledger clerks employed in the London office from time to time, upon the regular books of the bank, and that the entries were made in the regular course of business of the bank, and that the copy of the account attached to the Gill assignment was a full copy taken from the bank's books. The witness testified wholly from the copy of the account before him. It should be noted that the stipulation and the commission issued to take the testimony of this witness contemplated that his testimony would be taken before Commissioner W. H. Quarrell in London, where the books of the bank showing these transactions would be accessible. The deposition, however, was not taken before Quarrell, but before one Alex. Guild, at Edinburgh, Scotland, who had been commissioned to take the testimony of James Lawson Ander-

son only. This witness was asked in Cross-Interrogatory No. 2 (Tr. p. 74) whether statements made by him in answer to direct interrogatories relative to these accounts were "based upon personal knowledge of such advances, or merely upon entries you find in the books of the bank," to which the witness answered (Tr. p 45) rather evasively:

"I recollect that Frank Waterhouse, Limited, transacted business with the Commercial Bank of Scotland, Limited, and obtained cash advances from the bank. My recollection has been refreshed by an examination of the accounts appended to said assignation by the Commercial Bank of Scotland, Limited, in behalf of said John Gill."

The foregoing contains a full statement of all the testimony offered by the plaintiff to prove the indebtedness of Frank Waterhouse, Limited, to the Commercial Bank of Scotland, Limited. It is manifest that the evidence was not sufficient to even *prima facie* prove that indebtedness. Books of account are admissible under certain conditions as proof of the transactions entered on the books, provided the books are books of original entry and the entries are proven to have been made in the ordinary course of business and at the time of the transactions recorded, and are shown by the person who made them to have been correct entries and that the person making them had knowledge of the transactions shown by the entries.

It is recognized, however, that such testimony at best is unsatisfactory and is admitted only upon the ground of necessity, there being no other feasible way ordinarily of proving the various items in an open account. It is usual also to produce the books at the trial or before the Commissioner taking the deposition, so that they may be examined by the opposite party and the integrity of the entries as they appear upon the face of the books may be tested. It has been held in many cases that a copy of the account is inadmissible without the production of the books, in some instances even when the books were shown to have been burned.

Creamer vs. Shannon, 17 Ga. 65.

Peck vs. Paschen, 52 Ia. 46.

Pettit vs. Teal, 57 Ga. 145.

Halstead vs. Cuppy, 67 Ia. 600,

Creswell vs. Slack, 68 Ia. 110.

Moody vs. Roberts, 41 Miss. 74.

Clark vs. Bullock, 2 N. Y. Sup. 408.

In *Prince vs. Smith*, 4 Mass. 455, the Court rejected the account when offered without the production of the books, but indicated that if the books had been shown to have been burned and other proper preliminary proof had been tendered, the account might have been admissible. And in *Holmes vs. Marden*, 12 Pick. 169, the same rule is announced. In *Reddington vs. Gilman*, 1 Bosw. 235, and in Abbott's Trial Evidence, p. 325, it is stated that copies of an account are secondary evidence and loss of the books

must be shown before the account is admissible under any circumstances. The general rule of evidence is that the best evidence of which the case is susceptible must be produced if it is feasible to do so.

In this case, the original books of entry of the bank are in existence in the possession of the bank in London and were accessible and could have been reached by a Commissioner so that they could have been produced before the Commissioner, and the defendant given an opportunity to test the integrity of the entries by an inspection of the books and the entries themselves. These advances by the bank are alleged to have all been made upon checks drawn by Frank Waterhouse, Limited. Those checks are all in existence, some being in the possession of the witness McEwen, but the larger part being in possession of the bank. These checks should have been produced at the trial, or if there was any sufficient reason why the bank should not part with them, they should have been produced for inspection before a Commissioner and correct and accurate copies certified by him returned with his commission. The defendant was not a party to these transactions between Frank Waterhouse, Limited, and the bank. They took place in London and all of the books and accounts were kept in London. The defendant was resident in the State of Washington during all that time and had no per-

sonal knowledge of what was taking place between the London company and the bank. Under those circumstances, the plaintiff, standing in the shoes of the bank and seeking to collect the indebtedness of Frank Waterhouse, Limited, from this defendant, should be held to the strictest rules of evidence in proving the indebtedness.

Even if it was admissible to use the copy of the account without the production of the books or the checks, either at the trial or before the Commissioner, it is obvious that there must be supplemental proof, not merely that the account is a correct copy from the books, but that it is a correct copy of the items of account appearing upon the books of original entry of the bank, and in addition, the plaintiff must supply such other evidence as would have been necessary if he had produced the books themselves. The common law rule as to the admissibility of books of account in evidence, which, of course, prevails in Federal Courts, is stated in *Lewis vs. England*, 2 L. R. A. (N. S.) 405, as follows:

“The rule is that to authorize the introduction of books of account as evidence of the facts entered, it must be shown (a) that they have been fairly and honestly kept; (b) that they are the books of a party engaged in the business to which they refer; (c) that the entries were made, (1) in the usual course of business, (2) at or about the time the facts entered transpired; (b) that the entries are original and (e) made by a party hav-

ing knowledge of the facts entered, or that information thereof was communicated to the party by whom the entries were made by some person engaged in the business whose duty it was to transact the particular business and make report thereof for entry on the books, and (f) such report and entry must be made at the time of the occurrence or before the facts can be supposed to have passed from his recollection."

Books of account are not evidence *per se* and are admissible only when the entries in them are shown to be correct by the persons who made them and who had knowledge of the facts at the time the entries were made.

Ins. Co. vs. Weide, 9 Wall. 677.

Bates vs. Preble, 151 U. S. 149.

Probably the clearest statement of the rule prevailing in the Federal Courts is found in *Chaffee vs. U. S.*, 18 Wall. 516, at page 541. Referring to the rule governing the admissibility of entries in books of account the Court says:

"That rule, with some exceptions not included in the present case, requires for the admissibility of the entries not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reach of the process or commission of the Court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court where they may

be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. Admissibility of the declarations is in such cases limited by the necessity upon which it is found."

Further authorities to the same effect are:

Chicago Lbr. Co. vs. Hewitt, 64 Fed. 314.

Phillips vs. U S., 201 Fed 259.

Chandler vs. Pomeroy, 87 Fed. 262.

Little Rock Co. vs. Dallas Co., 66 Fed. 522.

Tested by these rules, there was a manifest failure to provide the supporting or supplemental testimony required to make the books admissible as evidence of the truth of the entries thereon.

The witness Lang testified that "the accounts were kept by the ledger clerks employed in the London office from time to time. They were kept upon the regular books of The Commercial Bank of Scotland, Limited, and the entries in said account were made in the regular course of business of said bank." (Tr. p 42).

Assuming that the witness is speaking from personal knowledge, all that he testifies to is that the entries in the books were made contemporaneously with the facts to which they relate. There is an untter failure to comply with the rule as laid down in the Chaffee case, to-wit: That proof must be furnished that the entries were made "by parties having personal knowledge of the facts and be corroborated by their testi-

mony, if living and accessible, or by proof of their handwriting, if dead or insane or beyond the reach of the process or commission of the Court."

Before these book entries are admissible in evidence, the ledger clerks referred to should have been produced as witnesses to prove that the entries made by them were correct entries and that they were cognizant of the transactions to which the entries relate.

The only other testimony relied upon by the plaintiff in error to prove the indebtedness of Frank Waterhouse, Limited, to the bank consists of some loose and evidently hearsay statements by the witnesses McEwen and Lang. McEwen, referring to the account "Exhibit E," stated:

"I am satisfied that said accounts correctly set forth the amount advanced to said Frank Waterhouse, Limited." (Tr. p. 35).

And again on page 36, he says:

"The said accounts correctly show the manner and amounts in which said accounts of Frank Waterhouse, Limited, were operated upon by cheques. The amounts shown by said accounts to have been paid out for the benefit of Frank Waterhouse, Limited, were actually so paid."

The witness Lang stated that "the correctness of the accounts was never disputed by Frank Waterhouse, Limited, or by anyone else." (Tr. p. 45). Both of these statements were excluded by the Court.

It is evident from a reading of the deposition of this witness that he is not speaking from personal knowledge of the actual transactions between the English corporation and the bank. McEwen was not connected with the corporation until after practically all of the principal loans or advances were made. He has never seen the bank books, so far as his testimony indicates, nor the checks on the principal account which are still in possession of the bank. The form of expression used by him, "I am satisfied," clearly indicates that he is intending to express an opinion rather than to claim any personal knowledge of the various items making up the account.

The witness Lang does not profess to have had any personal knowledge of the transactions whatever.

In *Phillips vs. U. S.*, 201 Fed. 259, the books of the Hanover National Bank were admitted in evidence over the objection of the defendant, in a prosecution for making a false entry in a report to the Comptroller of the Currency of the condition of the First National Bank of Vinita, of which he was an officer. Mr. Wheeler was called as a witness for the prosecution and testified that he was associated with the Hanover National Bank at the time of the transaction referred to and was familiar with its books of account; that he was city manager and had general supervision of the books of the bank and of the clerical force, whose duty

it was to keep the books; that his knowledge as to the books and means of identification came from his duties with the bank, and he testified specifically that the books were correctly kept and that they correctly stated the amount which they purported to state. Upon this testimony, the trial court admitted the books of the Hanover Bank as evidence. The Circuit Court of Appeals reversed the case, for the reason that taking the testimony of the witness Wheeler as a whole, it was apparent that he had no personal knowledge of the correctness of the items in the book, and that his positive statement that the books were correct meant no more than that he believed them to be correct.

The same comment is applicable to the testimony of McEwen, in so far as he states that he is satisfied the accounts are correct. The account is offered as a whole and certainly as to that part of the account originating prior to August, 1898—which comprised at least four-fifths of the entire indebtedness—he could by no possibility have had any personal knowledge, and does not claim to have had any.

A general statement by a witness that the account is correct when upon his own testimony it is apparent that he has no personal knowledge of the transactions, is not sufficient to warrant the admission of the account in evidence.

Chandler v. Robinett, 131 Pac. 891.

Prince vs. Smith, 4 Mass. 455.

Walker vs. Trotter Bros., 68 So. 345.

There is still another reason why these accounts were not admissible in evidence. Book accounts in order to be admissible must be sufficiently definite and specific to show in and of themselves the nature of the charges, so that no other evidence is necessary to show what the article charged is.

17 Cyc. 375.

Chandler vs. Robinett, 131 Pac. 891 (Cal.).

Tested by this rule, it will be seen that at least nine-tenths of the account does not show the nature of the charge. Taking "Exhibit D" (Tr. p. 94), the first item is entered:

"By loan 1000."

The second entry is:

"To cash 649."

There is nothing whatever on the face of this account to show what was the nature or character of the transactions represented by the subsequent entries on that page. The same remarks apply to a large majority of all of the other entries on all three of the accounts. There is nothing on the face of the account itself to show whether the charges made thereon were for cash advanced on checks or for discounts or bills of ex-

change or promissory notes, or for some other character of obligation incurred by Frank Waterhouse, Limited, to the bank.

There is always a degree of discretion vested in the trial Court to determine in the first instance whether the showing made is sufficient to dispense with the production of primary or the best evidence, so as to admit the secondary evidence in its stead, and in the matter of books of account, there is a measure of discretion resting with the trial Court to determine in the first instance whether the testimony offered to establish the trustworthiness of the book entries is sufficient to warrant the introduction of the books, and in such matters, his decision will not be overruled unless clearly erroneous.

Carlton vs. Corry, 81 N. W. 85.

Riley vs. Boehm, 167 Mass. 183.

Webster vs. San Pedro L. Co., 101 Cal. 326.

There can be no question that the production of the checks themselves, either on the trial of the case or before the Commissioner, so that copies could be used on the trial, would have been a more satisfactory method of proving that the items charged against the English Company by the bank were in fact advanced on checks of that company, particularly where it was necessary to show that the moneys were advanced upon checks signed by two of the directors and the secretary

of the company. In fact, it has been held in such case that the production of the checks is absolutely necessary and original entries by the teller in the books of the bank are not admissible without the checks.

Montgomery vs. Planett, 37 Ala. 222.

It is not necessary in this case to go to that length, but the failure to produce the checks, when it is shown that they are in existence and easily accessible and could have been produced, is a circumstance which can properly be considered by the court in determining whether under all the circumstances the best evidence available is being presented. The failure to produce the bank's books of original entry, or in fact, any of the bank's books, either at the trial or before the Commissioner, is another circumstance which could properly be considered by the Court in the same connection. Failure to produce as a witness any officer of the bank having personal knowledge of the advances made by the bank to Frank Waterhouse, Limited, is another circumstance tending to discredit the accounts. A failure to produce any of the officers or employees of the bank who made the entries in the books, or tender any witness with personal knowledge who could testify that the entries were correctly made, and by persons having knowledge of the transactions at the time, is such a serious defect in the proof that it would have been error upon the part of the Court below to have admitted the account in evidence.

We think the ruling of the Court sustaining the objections to the accounts was not only warranted, but a failure to have so ruled would have been reversible error.

V.

HEARSAY EVIDENCE.

Plaintiff in error, while apparently conceding that the testimony excluded by the Court upon objections made during the trial was either hearsay evidence or otherwise not the best evidence and therefore ordinarily not admissible, contends that by the stipulation under which the depositions of these witnesses were taken, the defendant's attorneys had agreed to waive objections to hearsay testimony. This stipulation (Record p. 52) was given by the defendant as a courtesy to plaintiff's attorneys and was intended as a waiver of technical formalities only; but it was not intended as a waiver of objections to improper or illegal testimony. It seems obvious that the defendant would not knowingly have stipulated that the plaintiff could take a roving commission to take testimony upon stated interrogatories and cross interrogatories and consent in advance that hearsay and matters of which the witnesses had no personal knowledge should be admitted as evidence, or that defendant intended to waive his right to demand the production of the best evidence

of which the nature of the subject was susceptible. The stipulation expressly reserves the right upon the trial of the case to object to the *materiality* or *relevancy* of any of the testimony. This stipulation should be given a fair construction with a view to carrying out the intention in the minds of the parties at the time it was executed. So construed, it manifestly does not preclude the defendant from objecting to hearsay testimony.

Materiality has been defined: "The property of substantial importance or influence, especially as distinguished from formal requirement. Capability of properly influencing the result of the trial."

Bouvier, Vol. 2, p. 115.

In Greenleaf on Evidence, Vol. 1, Sec. 50 (13th ed.), the general rules as to relevancy are stated as follows:

"General rules as to relevancy. The production of evidence to the jury is governed by certain principles which may be treated under four general heads or rules. The first of these is that the evidence must correspond with the allegations and be confined to the point in issue. The second is that it is sufficient if the substance only of the issue be proved. The third is that the burden of proving a proposition, or issue, lies on the party holding the affirmative. And the fourth is that the best evidence of which the case, in its nature, is susceptible must always be produced."

Manifestly, hearsay evidence is inadmissible under

the fourth rule above laid down as to relevancy. Hearsay is not the best evidence of any fact in issue.

In *Jones' Commentaries on Evidence*, Vol. 1, Sec. 135, in discussing the general subject of relevancy, the author says:

“The subjects of admissions, opinion evidence, *res gestae*, hearsay, book entries, and even other subjects, might logically enough be grouped under the general title of relevancy.”

These authorities clearly show that hearsay evidence may be excluded as irrelevant as well as immaterial. Strictly, the only fact proven by a hearsay statement is that such statement was made to the witness. If that fact was at issue, then the testimony would be material and relevant to prove that such statement had been made to the witness; but where the issue is not what statement had been made to the witness but what were the real facts as to the transactions about which the statement was made, it is manifest that it is immaterial whether the statement had been made to the witness or not.

The only testimony referred to by defendant in error as tending to show that the payment made by Gill to the bank in February, 1907, was not intended as a payment but as a purchase, and to establish contemporary agreement to transfer the debt of the bank against Frank Waterhouse, Limited, to Gill, was the

statement of Anderson, on page 32 of the Record, and the statement of McEwen, on page 36 of the Record, and the statement of Gill on page 26 of the Record. With respect to the statement of Gill, it is sufficient to say that he stated that he had no personal knowledge of the initiation of the transaction between John Gill and the bank, and then proceeds to state some understanding which he had acquired from some source which he does not disclose. He does not claim to have any personal knowledge of the transaction whatever.

By cross-interrogatory Number 3 (Record, p. 62) the witness Anderson was asked the following question:

“If you have stated in answer to direct interrogatory Number 10 that the letter of guarantee of Frank Waterhouse, Limited, was assigned to plaintiff, John Gill, please state at whose instance and request such assignment was made? Who first made the suggestion to the bank that said letter of guarantee should be so assigned or transferred? Was Alexander McNab a party to such negotiations or present in person or by representative at any time in connection therewith?”

The answer to this cross-interrogatory, if any was ever given, is not shown in the record.

In answer to cross-interrogatory Number 4, he does state that the payment was made to the bank by Gill in exchange for the assignation in his favor, but in the same connection he states that he understood the payment was made by check but that he has not the particulars.

By cross-interrogatory Number 5 he was specifically asked this question:

“Did you personally participate in the negotiations leading up to the execution of this assignment to the plaintiff John Gill (Record, p. 62)?”

His answer (Record, p. 32) is:

“As already stated, I did not participate in the negotiations leading up to the execution of the assignation to the said John Gill.”

It is clear, therefore, that this witness has no personal knowledge of the transaction between Gill and the bank further than the fact possibly that the bank did receive the money from Gill. The money, however, was paid in February, 1907, and the assignment was not made until October, 1907.

The testimony of McEwen, which was excluded by the Court, is found on page 35 of the Record. He stated that he had examined a copy of the accounts of the English Company with the bank and that he was satisfied they correctly set forth the amount advanced. He further stated, in answer to cross-interrogatory, that he was not connected with the English Company until after the greater part of the advances had been made, and therefore he could have had no personal knowledge of the transactions at the time the advances were made. The statement is merely an expression of opinion as to the correctness of the accounts

Another statement of witness McEwen, referred to by plaintiff in error, is that found on page 26 of the Record. He stated that some time subsequent to his appointment as liquidator of the English Company, he wrote to the bank notifying of his appointment and asking them to send him a certified statement of their claims against the English Company, and that they informed him that the English Company's indebtedness had been settled with the bank by Mr. Gill and that they had assigned their claim to him. Evidently, this is improper testimony. Neither the witness' statement to the bank nor the bank's statement to him was in any sense proper testimony as against the defendant in error in this case, neither having been a part of the *res gestae*.

VI.

The seventh Assignment of Error is that the Court erred in admitting over the objection of the plaintiff the agreement made October 6, 1900, between the defendant in error on the one part, and Frank Waterhouse, Limited, of the other part. This is shown as Plaintiff's Exhibit "I" in the Record. As a matter of fact and as the record shows, this agreement was never admitted in evidence by the Court. It was offered in evidence by the defendant as a part of the cross-examination of the witness McEwen, but was objected

to by plaintiff and the ruling reserved by the Court. No subsequent ruling was made by the Court with respect to this exhibit (Record, p. 38),

The Court in the memorandum opinion sustaining the nonsuit, did refer to this agreement as showing the relations between the English Company and McNab, and the defendant in error, and as shedding some light upon the question whether the payment made by Gill was intended as a purchase rather than a payment. This agreement was made a part of cross-interrogatory Number 5 addressed to the witness McEwen (Record, p. 68). It thereby became incorporated into and formed a part of the interrogatories propounded to that witness, and it was essential that it be read as a part of the interrogatory in order to understand the answer of the witness. No objection was ever made by plaintiff to the interrogatory which incorporated the agreement as a part of it. It thereby became in fact a part of the record, and it was legitimate for the Court to refer to it as a part of the record.

Plaintiff in error urges that this agreement is not shown to have been performed on the part of the defendant in error, for the reason that it is not shown that the defendant in error had carried out the agreement upon his part by the payment of the American indebtedness therein referred to. The witness McEwen does testify that this agreement was entered into by the

English corporation and that the English corporation thereupon ceased to carry on any active business in America, that being one of the stipulations in the agreement. He also testified that McNab was informed of the agreement and a summary thereof submitted to him on the day of its execution. He does not recollect whether the bank was notified of this agreement or not, but does state that the bonds of the American corporation organized by the defendant pursuant to the terms of this agreement, were lodged with the bank for safe custody, and that information of the agreement was not withheld from the bank. It is apparent from this testimony that the agreement was acted upon by the defendant in error at least to the extent of organizing the corporation contemplated and the issuance of the bonds called for, and that it was acted upon by the English corporation to the extent of receiving those bonds and immediately ceasing to carry on active business operations.

We are not seeking to enforce the terms of this agreement as against the bank, and it is not referred to by the Court in that connection, but it is a circumstance showing the situation or relationship of the parties at the time of the payment of the bank's debt by Gill. In that connection we also call attention to the fact that although the English Company ceased business in October, ¹⁹⁰⁰~~1903~~, no claim was ever made

against this defendant by the bank until October 31, 1906, when a letter was written to the defendant by the bank, making demand for payment, being Plaintiff's Exhibit "C" in the record. This communication was signed by the witness Anderson, and in his direct testimony he says:

"A letter was written by me for the Commercial Bank of Scotland, Limited, to Frank Waterhouse relative to the accounts of Frank Waterhouse, Limited, on the 31st October, 1906, and I append a copy of said letter to my deposition as Exhibit "B" (Record, p. 31.)"

By cross-interrogatory Number 9 (Record, p. 64) Anderson was asked:

"If, in answer to direct interrogatory Number 14, you state that a letter was written by you for the Commercial Bank of Scotland, Limited, to the defendant, Frank Waterhouse, relative to the account of Frank Waterhouse, Limited, on or about October 31, 1906, state whether or not any requests or demands were made by the bank on Frank Waterhouse, Limited, or on any of its officers or directors for payment of the indebtedness of Frank Waterhouse, Limited, between the opening of said account in the year 1898, and the writing of said letter of October 31, 1906,"

to which he answered that he did not know whether demands for payment were made upon Frank Waterhouse, Limited, and the officials of that company prior to the 31st of October, 1906. He was further asked in the same interrogatory whether at the same time he wrote to the defendant the bank made a demand upon

the other guarantors, to which he replied that he was unable to find any record of payment having been called for from any of the other guarantors. He was further asked in the same interrogatory why demand was made upon the defendant and not made upon the other guarantors, to which he stated he was unable to give any reason. He was also asked in the same connection:

“Please state at whose instance and request the letter of October 31, 1906, was written by you,”

to which he answered:

“The letter of 31st October, 1906, although signed by me, was not written on my instructions.”

But he evades answering the specific question at whose instance and request the letter was written. He does state, however, that McNab, one of the other guarantors, was a customer of the bank at that time and was reputed to be wealthy, and that his business was that of a distiller and director of public companies.

In view of the failure of the plaintiff to produce as witnesses any of the parties who had personal knowledge of the correctness of the books of the bank, or the production of any other proper evidence to prove the indebtedness of the English Company to the bank, by any witness having personal knowledge thereof, and the failure to produce any witnesses who had personal knowledge of the transaction between the bank

and Gill, and the palpable evasion of the answers of the Secretary of the bank with respect to matters on which he did have information, it was clearly within the province of the trial Court in the exercise of his discretion to refuse to admit hearsay testimony and secondary evidence, when the whole surrounding circumstances showed that it was within the power of the plaintiff to produce direct testimony and the best evidence if it had seen proper to do so.

Respectfully submitted,

HAROLD PRESTON, AND

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Defendant.

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No. 2903

**In the United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

JOHN GILL, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased,

Plaintiff in Error,

vs.

FRANK WATERHOUSE,

Defendant in Error.

**Upon Writ of Error to the United States District Court for the
Western District of Washington,
Northern Division.**

BRIEF OF PLAINTIFF IN ERROR

**HUGHES, McMICKEN, DOVELL & RAMSEY,
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**660-671 Colman Building,
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Filed

FEB 9 - 1917

Monckton
Clerk



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Defendant in Error.

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Western District of Washington,
Northern Division.**

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

Frank Waterhouse, Limited, was incorporated in December, 1897, under the laws of Great Britain, for the purpose of engaging in the shipping and insurance business. The registered office of the company was in London, England, but the business of

the company was principally conducted in Seattle and Tacoma, though all of its shareholders, except Frank Waterhouse, were residents of either England or Scotland. (Record p. 37.)

On March 18, 1898, Frank Waterhouse, Limited, commenced to borrow money from the London Branch of The Commercial Bank of Scotland, Limited. The advances made by the Bank to Frank Waterhouse, Limited, were made under separate accounts. One of these accounts was known as the "Loan Account," and £15,000 was advanced to Frank Waterhouse, Limited, by the Bank upon this account. Another account was known as "No. 2 Account," and £5,000 was advanced to Frank Waterhouse, Limited, on this account. The remaining account was the current or general account of Frank Waterhouse, Limited (Record, p. 46).

On February 16, 1899, Frank Waterhouse, who at that time was a resident of Tacoma, Washington, but was then in London, executed, in the presence of the manager and accountant of the Bank, the following letter of guaranty: (Record, pp. 3, 4.)

"To The Commercial Bank of Scotland, Limited.

I, Frank Waterhouse, Tacoma, Washington, United States, America, hereby guarantee you payment of all sums for which Frank Waterhouse, Limited, of one hundred and forty-seven Cannon Street, London, whether on an account or accounts kept in their name in your books and operated on for them by cheques or drafts signed by two of their directors and their secretary, all for the time, or on bills, promissory notes or other obligations, are or may be liable to you, but the amount for which I shall be

liable under this Guarantee shall not exceed twenty-one thousand pounds sterling with interest, from the date or dates at which the said Frank Waterhouse, Limited, have become or shall become indebted to you; and I declare (1) that you shall be entitled to require from me whenever you think fit, a payment or payments to account of my liability; (2) that you may grant to the said Frank Waterhouse, Limited, or to the obligants in any bills of exchange or promissory notes, or other writings received by you from them, or in which they may be liable to you, time or other indulgence, and compound with them or such obligants, and may give up any securities which you now have or may hereafter have belonging to the said Frank Waterhouse, Limited, or to others, all without consulting me, and without affecting my obligation to you; (3) that I shall not be entitled to rank on the estate of the said Frank Waterhouse, Limited, in respect to any payment or payments to account as aforesaid, nor to have the benefit of any securities such as aforesaid until your whole claims against them are satisfied; and (4) that this guarantee is a continuing obligation and can be recalled by me only by writing and shall remain in force notwithstanding my death until recalled in writing, and shall apply to all sums for which the said Frank Waterhouse, Limited, shall become indebted to you prior to such recall.

In Witness Whereof, These presents are subscribed by me at London on the sixteenth day of February eighteen hundred ninety-nine before these witnesses: Andrew Whitlie, Manager, and William Bamford Lang, Accountant, both of your branch there.

(Signed) Frank Waterhouse.

(Signed) And. Whitlie,
Witness,

(Signed) W. B. Lang,
Witness."

The total amount, plus interest to October 31, 1903, loaned by the Bank between March 18, 1898, and October 31, 1903, was £103,217:11:11, no part of which had been repaid at the time of the institution of this suit, except the sum of £80,319:15:6. "The correctness of the accounts was never disputed by Frank Waterhouse, Limited, or by any one else." (Record, p. 45.)

"Demands were made upon the company and numerous verbal demands were made upon the Directors and Secretary by the Bank for payment of the indebtedness shown to be due by the company by said accounts" (Record, p. 36) and on October 31, 1906, the Bank wrote the following letter to Frank Waterhouse at Seattle: (Record, p. 90)

"31st October, 1906.

Dear Sir:

The Directors have resolved to call for payment of the advances to Frank Waterhouse Limited, Salisbury House, London, for which in respect of your letter of Guarantee, dated 16th Feby. 1899, you are responsible to the Bank. I have therefore to request you to make immediate payment of the sum due and relative interest. Annexed is a note of the sum due, with interest to date.

Yours faithfully,

(Signed) J. L. Anderson,
Secretary.

Note of sums due by Frank Waterhouse Limited within referred to.

		Interest from 31st Octr 1903 to 31st Octr 1906
Loan A/C	£15000	£2257.11.11
No. 1 A/C	1151.17.9	169.14.10
No. 11 A/C	3479.13.3	536.18.10
	-----	-----
	19631.11	2964. 5. 7
Add Interest	2964. 5.7	

	22595.16.7"	

The Bank had no security for its loan except four letters of guaranty, one of which was that executed by the defendant and hereinbefore set out (Record, p. 46). The Bank being desirous that the debt owing by Frank Waterhouse, Limited, should be repaid, Mr. Alexander McNab, who was one of the guarantors of the company's debt but who was not in a position to meet the guaranty if it were enforced against him, approached John Gill as a friend and asked him to *take over the debt*. Gill agreed to do so, and paid to the Bank the sum of £22,897:16:5, or \$109,909.54. (Record, p. 26.) Payment to the Bank by Gill was made in the first part of 1907 and on October 8, 1907, the Bank executed in favor of John Gill an assignment of its claim and the defendant's letter of guaranty. (Record, p. 91.)

On April 7, 1908, an extraordinary general meeting of the shareholders of Frank Waterhouse, Limited, was held, and at that time a liquidator for the company was appointed. Subsequently the liqui-

dator wrote to the Bank, intimating his appointment, and asking the Bank to send him a certified statement of its claims in the liquidation. The Bank thereupon informed the liquidator that the company's indebtedness to it had been settled by Mr. John Gill, S. S. C., Edinburgh, and that its claim had been assigned to him. Thereafter Mr. Gill rendered his claim to the liquidator. The liquidator admitted the claim and paid to Mr. Gill, and, after his death, to his executors, dividends in respect of Mr. Gill's claims in the liquidation to the amount of £2924:17:4 (Record, pp. 36, 37).

In March, 1909, the present suit was brought. John Gill having died in December, 1910, Maurice McMicken, Administrator with the will annexed of the estate of John Gill, deceased, was substituted as party plaintiff in the suit. The case came on for trial in June, 1916. All of the testimony adduced at the time of the trial, except certain documentary evidence relating to the jurisdiction of the Court, was in the form of depositions taken under a stipulation which provided, among other things, that all objections to the taking of the testimony, save as to the relevancy or materiality of any question or answer, or part thereof, was waived. (Record, p. 52.)

The Court, at the conclusion of plaintiff's testimony, granted a non-suit upon the following grounds:

First: That there was no sufficient evidence that The Commercial Bank of Scotland had notified Waterhouse of its acceptance of his guaranty so as

to constitute a mutual contract of guaranty between them; and

Second: That the evidence of the accounts of the Bank showed payment of the indebtedness of Frank Waterhouse, Ltd., to the Bank on February 15, 1907, without any sufficient evidence of mutual intention on the part of the Bank and John Gill that the payment of the indebtedness by Gill was based upon an understanding or agreement that payment was made in consideration of an assignment to be executed to him, and that the subsequent assignment by the Bank to Gill was a mere afterthought (Record, p. 50).

ASSIGNMENT OF ERRORS.

I.

The Court erred in rejecting the following evidence offered by the plaintiff upon said trial, to-wit:

An assignation made by The Commercial Bank of Scotland, Limited, in favor of John Gill, and dated October 8, 1907, same being Exhibit "D" attached to the bill of exceptions (Record, p. 31).

II.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to-wit:

The account between The Commercial Bank of Scotland, Ltd., and Frank Waterhouse, Ltd., which said account is attached to the assignation described in Assignment of Error I herein. (Record, p. 31.)

III.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to-wit:

“The payment of £22,897:16:5 was made to the Bank by the said John Gill in exchange for the assignation in his favor. The payment was made by a cheque of his own I understand. I have not the particulars of the cheque.” (Record, p. 32.)

IV.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to-wit:

“I have examined the copy of the accounts of Frank Waterhouse Ltd. with The Commercial Bank of Scotland Ltd. appended to the deposition of George Sutherland Coutts, taken on the 17th December 1913, and I am satisfied that said accounts correctly set forth the amount advanced to said Frank Waterhouse, Ltd. The amounts due by Frank Waterhouse Ltd. to the Bank at 31st October 1903 were as follows: (1) On the current or general account £1151.17.9. (2) On the loan account £15,000 and (3) on No. 2 account £3479.13.3. These amount in all, with interest to February 15, 1907, to £22,897.16.5.” (Record, p. 35.)

V.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to-wit:

“Subsequently I wrote to the Commercial Bank of Scotland Ltd., intimating my appointment and asking them to send me a certified statement of their claim in the liquidation. They informed me that

the Company's indebtedness to them had been settled by Mr. John Gill, S. S. C., Endinburgh, and that they had assigned their claim to him:" (Record, p. 36.)

VI.

The Court erred in receiving the following evidence offered by the defendant herein upon said trial, to-wit:

An agreement made on the 6th day of October, 1900, between Frank Waterhouse, of Seattle, Washington, of the one part, and Frank Waterhouse, Limited, a corporation, of London, E. C., of the other part, which said agreement is attached to the bill of exceptions herein, marked Exhibit "I" and made a part thereof. (Record, p. 38.)

VII.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to-wit:

A copy of account identified by William McEwen, and which said account is attached to the bill of exceptions herein, marked Exhibit "E" and made a part of said bill of exceptions. (Record, p. 40.)

VIII.

The Court erred in holding and deciding that the testimony introduced in said cause was not sufficient to warrant a verdict in favor of plaintiff. (Record, p. 50.)

IX.

The Court erred in withdrawing the cause from the jury. (Record, p. 50.)

X.

The Court erred in rendering a judgment of dismissal of said cause. (Record, p. 19.)

BRIEF OF THE ARGUMENT.

I.

The first reason assigned by the Court for withdrawing the case from the jury was that there was no evidence in the record showing that the Bank notified Waterhouse that it had accepted his letter of guaranty. The basis for the Court's ruling was that the decision in the case of *Douglass v. Reynolds*, 7 Pet. 113, was applicable to the facts in the case at bar. In that case, the Supreme Court, speaking by Mr. Justice Story, said: (p. 125)

“A party giving a letter of guarantee has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct and his exercise of vigilance in regard to the party in whose service it is given. Especially is it important in the case of a continuing guarantee, since it may guide his judgment in recalling or suspending it.”

The letter of guaranty in that case read as follows:

“Port Gibson, December, 1807.

Messrs. Reynolds, Byrne, and Co.

Gentlemen: Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding \$8,000, should the said Chester Haring fail to do so.

Your obedient servants,

James S. Douglass,
Thomas G. Singleton,
Thomas Going.”

It will be noticed that the letter was written in Port Gibson, Mississippi, by persons who apparently had no pecuniary interest in the business of Mr. Haring, that the party guaranteed lived in another State, that the letter is a mere offer or proposal on the part of the guarantors, that the guarantors did not guarantee *payment*, but collection only, that the tenor of the letter, the residence of the parties, and the fact that the guarantors were accommodation guarantors only, preclude the idea that any request for guaranty had been made by the party to be guaranteed, and that there is no statement in the opinion that the guarantors ever knew that Haring had even delivered the letter to Reynolds, Byrne and Company. The facts in that case, then, bring it squarely within the rule enunciated in *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 527:

“But if the guaranty is signed by the guarantor without any previous request of the other party, and *in his absence*, for no consideration moving be-

tween them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.” (*Italics ours.*)

In the case at bar, however, Frank Waterhouse, a shareholder and director and pecuniarily interested in a company which bore his name and which was then owing the Bank a large sum of money, goes to London, England, and there, in the presence of two of the officers of the Bank, executes a letter of guaranty, in which, among other things, he says: I hereby guarantee you *payment* (not collection) of all sums for which my company is now or may become indebted to you up to the amount of £21,000 sterling, plus interest, and I declare to you that you shall be entitled to require from me, whenever you think fit, a payment or payments to account of *my liability*; that you may grant time or indulgence to or give up securities belonging to Frank Waterhouse, Limited, without consulting me or affecting my obligation to you.

If this is not an absolute guaranty, it would be difficult to conceive of a guaranty which is absolute.

All the authorities, however, hold that in the case of an absolute guaranty, no notice of acceptance need be given to the guarantor.

“An absolute guaranty is an unconditional promise of payment or performance on default of the principal. To bind the guarantor it is not necessary that there should be notice of acceptance of the guaranty or notice of default of the principal, or

that any steps should be taken to enforce the contract guaranteed against the principal.”

14 Amer. & Eng. Ency. of Law, p. 1141.

“Where a guaranty is absolute, no notice of its acceptance is necessary to fix the liability of the guarantor, unless notice be made a condition of the guaranty.”

14 Amer. & Eng. Ency. of Law, p. 1145, and cases cited.

In addition to the cases cited in support of the foregoing text, we call the Court's attention to the following decisions:

Paige v. Parker, 8 Gray (Mass.) 211.

Bank of California v. Union Paving Co., 111 Pac. 573, 60 Wash. 456.

United States Fidelity & Guaranty Co. v. Ruffler, 239 U. S. 17.

People's Bank of New Orleans v. Lemarie, 106 La. 429.

Cowan v. Roberts, 134 N. C. 415, 46 S. E. 979.

McKee v. Needles, 98 N. W. 618.

Manry v. Waxelbaum, 33 S. E. 701, 704.

Reese v. W. T. Rawleigh Medical Co., 172 S. W. 820.

Booth v. Irving Nat. Exch. Bank, 82 Atl. 652.

J. R. Watkins Medical Co. v. Brand, 143 Ky. 468, 136 S. W. 867, 33 L. R. A. (N. S.) 960.

Bryant v. Stout, 44 N. E. 68, 45 N. E. 343.

Wheeler v. Rohrer, 52 N. E. 780.

Frost v. Standard Metal Co., 215 Ill. 240, 74 N. E. 139.

Note in 16 L. R. A. (N. S.) at pp. 354, 357, 359.

Note in 15 Am. & Eng. Ann. Cas., p. 1164.

Note in 105 Am. St. Rep., p. 514.

Moreover, in view of the fact that Frank Waterhouse was a director and shareholder in Frank

Waterhouse, Limited, no notice of acceptance to him was necessary.

In the case of *Doud et al. v. National Park Bank of New York*, 54 Fed. 846, the syllabus is as follows:

“A personal guaranty given by stockholders and directors of a bank to another bank, in consideration of ‘loans, discounts, or other advances to be made,’ for the repayment of any indebtedness thus created, imposes a liability on the guarantors, when acted on by the guarantee, though no notice of acceptance of the guaranty was given; for the contract shows a personal interest of the guarantors in the advances, constituting a consideration moving to them.”

See also:

Bond v. John V. Farwell Co., 172 Fed. 58, 63.
Brand on Suretyship and Guaranty, Sec. 214.

II.

The remaining ground for the Court's action in withdrawing the case from the jury was that the Court thought that payment, when made by Gill, was made on behalf of McNab and others, and that, at the time, Gill did not intend to take, nor did the Bank intend to grant, an assignment of Waterhouse's guaranty.

We understand the rule to be that “a stranger, at the time he pays to the creditor the amount of the debt, may take an assignment of it without the consent or knowledge of the debtor; and if when he pays the amount, there be an express agreement that the debt is to be assigned to the stranger, this would amount to an equitable assignment of the debt, though no formal assignment was ever exe-

cuted; for this understanding shows that the stranger did not pay the debt, but really purchased it, which of course he could do without the consent of the debtor.”

Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794, 799.

In Vol. 27 Amer. & Eng. Ency. of Law, p. 356, it is said:

“In order that one, having no interest to protect, who pays the debt of another, or advances money for the purpose, may be entitled to succeed to the rights and remedies of the creditor in respect of the debt so paid, there must be a convention or agreement to that effect. This convention or agreement may be made with either the debtor or creditor.”

See also:

Crippen v. Chappel, 11 Pac. 453, 455.

Wilkin v. Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204, 216.

Contoocook Fire Precinct v. Town of Hopkinton, 53 Atl. 797, 799.

If, therefore, there is any material or relevant testimony in the record from which the jury might have determined that the parties at the time of payment did intend that the guaranty of Waterhouse should be assigned to Gill, then the non-suit should not have been granted.

James Gill, the grandnephew and assistant in business of John Gill, and one of the executors of his estate, testified as follows:

“I have no direct personal knowledge of the initiation of the transaction between the late John

Gill and the Commercial Bank of Scotland, Ltd., but my understanding is that the bank were desirous that the debt due by Frank Waterhouse, Ltd., should be repaid and that Mr. Alexander McNab, who was one of the guarantors and who was not, I understand, in a position to meet the guarantee if it were enforced against him, approached the late John Gill as a friend and asked him to *take over the debt*; that the late John Gill agreed to do so, and paid off the debt, which amounted to £22,897:16:5, and obtained the assignation before mentioned by the Commercial Bank of Scotland, Ltd., in favor of himself as an individual, *in consideration of said payment* by him to the bank, and that the payment was made by cheque or cheques by the late John Gill." (Record, pp. 26, 27.)

Certainly this statement shows that it was the intention of the parties that the letter of guaranty of Waterhouse should, in consideration of the payment by Gill, be assigned to him.

James Lawson Anderson, the Secretary of the Bank, testified that "the payment of £22,897:16:5 was made to the Bank by the said John Gill *in exchange for* the assignation in his favor" (Record, p. 32), while William McEwen, Secretary of Frank Waterhouse, Limited, from August, 1898, and subsequently liquidator of the Company, testified:

"I should explain that on 7th April, 1908, I was appointed the voluntary liquidator of the company at an extraordinary general meeting of the shareholders held on that date. Subsequently I wrote to the Commercial Bank of Scotland, Ltd., intimating my appointment and asking them to send me a certified statement of their claims in the liquidation. They informed me that the company's indebtedness

to them had been settled by Mr. John Gill, S. S. C., Edinburgh, and that they had assigned their claim to him. Mr. Gill subsequently rendered his claim to me as liquidator of the company and I admitted the claim. I have paid to the said John Gill, and after his death to his executors, dividends in respect of Mr. Gill's claim in the liquidation. The sums which I have paid to him and them to date amount to £2924.17.4." (Record, pp. 36, 37.)

Parenthetically, it may be said, that the above quoted testimony of Anderson and a portion of the above quoted testimony of McEwen was objected to on the part of the defendant on the ground that such testimony was hearsay, but, as we shall hereinafter show, any such objection was waived.

Despite this testimony, the trial Court determined, as a matter of law, that at the time payment was made Gill did not intend to take, or the Bank intend to grant, an assignment. The Court's conviction that the assignment was an afterthought was based upon four facts, the first one of which is that McNab, who was a stockholder in Frank Waterhouse, Limited, also liable to the Bank on letters of guaranty, and a client of Gill, asked Gill to take over or purchase the debt. But how does the relationship of McNab to Frank Waterhouse, Limited, or to the Bank, or to Gill, absolutely preclude the idea that Gill and the Bank entered into an agreement providing that, in consideration of Gill's paying to the Bank the amount of its claim, Gill should succeed to the rights and remedies of the Bank?

The second reason assigned by the Court is that Frank Waterhouse and Frank Waterhouse, Limited, entered into a contract in October, 1900, by the terms of which Frank Waterhouse, Limited, was to discharge the London indebtedness of the Company upon certain payments being made and certain acts being performed by Frank Waterhouse. This agreement was erroneously admitted in evidence, as we shall hereinafter show. But eliminating that contention from consideration now, still there is no evidence in the record that Frank Waterhouse ever paid a single dollar of the amount required to be paid by said contract. If he has performed the conditions imposed upon him by the agreement, why did he not, years ago, demand the surrender to him or the cancellation of his letter of guaranty? How the execution of this contract had any bearing on the case at the time the non-suit was granted, we are at a loss to understand.

The next reason assigned by the Court is that Gill did not secure a written assignment of the remaining letters of guaranty. It is true that no formal written assignment of the remaining letters of guaranty was executed, but when payment was made the Bank sent these letters to Gill, and the equitable title to them has, ever since payment, been in Gill.

In re Hallett & Co. (1894), 2 Q. B. 258.

But how can the Court determine, as a matter of law, that because one letter of guaranty was not assigned, another guaranty was also not assigned?

The fourth reason assigned by the Court was that payment was made on February 15, 1907, but that the written assignment was not executed until October, 1907. But, surely, mere delay in executing a written instrument is not sufficient, as a matter of law, to determine that there was no agreement for assignment made at the time of payment.

“But the doctrine generally adopted is that a conventional subrogation can result only from a direct agreement to that effect made with either the creditor or the debtor, and that it is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he is to be subrogated to the rights of the creditor, though, if the agreement has been made, a formal assignment will not be necessary. And the agreement may be shown by *subsequent acts* which indicate a *prior agreement*. Thus, where a stranger pays the amount of an execution which has been put into the hands of a sheriff, a subsequent assignment of the judgment by the plaintiff therein to the person making the payment will be regarded as showing that the payment was made in *purchase*, and not in discharge of the judgment.”

Sheldon on Subrogation, §248.

While delay may be a circumstance to be weighed by the jury in determining whether an antecedent agreement for assignment was made, yet the jury had the right to consider that the delay may have been occasioned by the fact that the officers executing the assignment, and presumably the only ones authorized to do so, resided at Edinburgh, while the transactions of Frank Waterhouse, Limited, took place at the London branch of the Bank.

The jury also had a right to consider that the Bank acted honestly. The Bank did not, however, act with honesty of purpose when it executed the written assignment, if there was no agreement made at the time of payment that Gill should succeed to all the rights and remedies of the Bank. Moreover, if the problem as to whether a previous convention for assignment had been concluded was an evenly balanced one in the minds of the jurors, would they not have a right to consider the rule that "it is not in accordance with common experience for one man to pay the debt of another without receiving any benefit from his act." (128 U. S. 423.) But, above all, the jury did have a right to consider the testimony of James Gill that John Gill purchased the debt and in part consideration for the money paid by him was to receive an assignment; and also the testimony of Anderson that payment was made in exchange for the assignment.

Penwell v. Flickinger, 129 Pac. 323, and *Moran v. Abbey*, 63 Cal. 56, cited and relied upon by counsel for defendant in the trial court, are not in point. In the first of these cases it appears that the defendants agreed to sell to the Beaverhead Ranch Company an automobile for \$956.50. The purchase price was paid, but the defendants never delivered the automobile, nor did they return the money. Penwell, who had induced the Company to buy this particular car from the defendants, felt that he was responsible for the Ranch Company's loss. Actuated by what the Court denominates "a delicate and

praiseworthy sense of business ethics," he went to Butte, bought for the Ranch Company an automobile worth \$795.50, and then paid \$161.00 in cash to the Ranch Company. The Ranch Company did not make any agreement with Penwell to assign its claim to him, nor did the defendants request Penwell to return or repay the Ranch Company the money theretofore paid them, but, as a matter of fact, expressly dissented from such act. In September, 1910, Penwell brought suit against the defendants. Four months later the Ranch Company assigned its claim to Penwell, and he then filed a supplemental complaint in which he apparently for the first time alleged that an assignment of the Ranch Company's claim had been made to him. The Court said:

"Equally certain is it that there was no subsequent ratification or promise to repay, *and there is not a suggestion in the record of any oral assignment of its claim from the company to the respondent when he made the payment, or of any understanding that it should be assigned or kept on foot for his benefit.* Under such circumstances the general rule is that the payment extinguishes the debt, at least so far as the creditor is concerned."

If it can be said that there is absolutely no testimony in the case at bar which shows that an agreement for assignment was made at the time of payment, then the Penwell case is in point; otherwise, not.

The case of *Moran v. Abbey*, 63 Calif. 56, is also not in point. On December 30, 1875, Abbey, together with one Heffner, an accommodation surety

only, executed a note in favor of George Hancock. Hancock left the note at a bank for collection. Prior to the maturity of the note, Abbey turned over all his property to Moran and then became a voluntary or involuntary bankrupt. The creditors of Abbey had attached the property turned over to Moran, and between him and them a contest arose, in which he was cited to appear in the bankruptcy court for examination under oath touching the property or effects of Abbey which he had in his possession or under his control. After being cited to appear for examination, but before so appearing, he went to the bank and paid to the bank the amount of the note. Moran knew Hancock, but never had any conversation with him relative to this note until about three years after the date of its payment, when, acting upon the advice of his attorney, he went to Hancock and induced Hancock to execute a qualified endorsement of the note. In view of the fact that at the time of payment to the bank Hancock knew nothing of the transaction, it cannot be argued that Hancock entered into any contract whatsoever with Moran.

It will thus be seen that in both of these cases there was not only no testimony in the record showing or tending to show that a prior convention for assignment had been made, but also that the facts proven precluded any inference even of the making of such an agreement. The plaintiff in each of these cases was defeated, not because the written assignment was executed *subsequent* to the

making of the prior agreement, but because no such prior agreement was ever made.

III.

Some technical objections relative to the admission or exclusion of certain testimony remain for consideration.

(a) During the course of the trial, certain testimony was offered in evidence, to which objection was made on the ground that such testimony was hearsay. The testimony so objected to is the following:

That of Anderson, Secretary of the Bank, to-wit:

"The payment of £22,897:16:5 was made to the bank by the said John Gill in exchange for the assignation in his favor. The payment was made by a cheque of his own, I understand. I have not the particulars of the cheque." (Record, p. 32.)

That of McEwen, Secretary and Liquidator of Frank Waterhouse, Limited, to-wit:

"Subsequently I wrote to the Commercial Bank of Scotland, Ltd., intimating my appointment and asking them to send me a certified statement of their claims in the liquidation. They informed me that the Company's indebtedness to them had been settled by Mr. John Gill, S. S. C. Edinburgh, and that they had assigned their claim to him." (Record, pp. 36, 37.)

That of McEwen, to-wit:

"I have examined the copy of the accounts of Frank Waterhouse, Ltd., with the Commercial Bank of Scotland, Ltd., appended to the deposition of George Sutherland Coutts, taken on the 17th December, 1913, and I am satisfied that said accounts

correctly set forth the amount advanced to said Frank Waterhouse, Ltd. The amounts due by Frank Waterhouse, Ltd., to the Bank at 31st October, 1903, were as follows: (1) On the current or general account £1151.17.9. (2) On the loan account £15,000 and (3) on No. 2 account £3479.13.3. These amount in all, with interest to February 15, 1907, to £22,897.16.5." (Record, p. 35.)

And a copy of the account between Frank Waterhouse, Limited, and the Bank, which said copy was identified by McEwen and is attached to the bill of exceptions as Exhibit "E." (Record, p. 40.)

The Court reserved its ruling on these objections, but at the conclusion of the trial, in rendering his oral opinion, said:

"The objections to the offers of testimony which have been reserved must be sustained and the motion to dismiss must be granted." (Record, p. 52.)

It is apparent from the language of his opinion that he sustained the objections because of the fact that he considered that the execution of the assignment was an afterthought, and not because the testimony was hearsay. If it be urged in this Court, however, that this testimony should have been excluded from the jury because of the fact that it was hearsay, we reply that it is not open to the defendant to make this contention. All of the testimony, as we have said, except that relative to the jurisdiction of the Court, was taken under a stipulation expressly waiving all objections save as to the relevancy and materiality of any question or answer or part

thereof. (Record, p. 53.) The testimony above quoted was certainly relevant and material, and though, by reason of judicial decisions in this country, it might have been incompetent because hearsay, yet, by the express stipulation of the parties, hearsay testimony, if relevant and material, was admissible.

In the case of *Fourth Natl. Bank v. Albaugh*, 188 U. S. 734, 737, the Supreme Court said:

“In these days, when the whole tendency of decisions and legislation is to enlarge the admissibility of hearsay where hearsay must be admitted or a failure of justice occur, we are not inclined to narrow the lines.”

If the tendency of judicial decisions is to enlarge the admissibility of hearsay, it certainly cannot be fairly argued that hearsay testimony should be excluded when the parties have expressly stipulated that it was admissible.

(b) The seventh assignment of error (numbered VI herein) is that the Court erred in admitting, over the objection of plaintiff on the ground that it was irrelevant and immaterial, an agreement made on October 6, 1900, between Frank Waterhouse, of Seattle, Washington, on the one part, and Frank Waterhouse, Limited, a corporation of London, E. C., on the other part. This agreement, in substance, provided that an American company should be formed by Frank Waterhouse, and that such American company should purchase the property of Frank Waterhouse, Limited, paying therefor \$50,000

in cash and \$180,000 in bonds to be executed by such American company and to be in such form as should be satisfactory to the attorneys of Waterhouse, Limited. It further provided that the American company should also pay certain debts of Frank Waterhouse, Limited, aggregating about \$50,000. Upon such payment being made by the American company, Frank Waterhouse, Limited, agreed to discharge all of its London indebtedness with said purchase money, except the indebtedness due Trinder, Anderson & Co. As we have heretofore said, there is not a particle of proof in the record that Frank Waterhouse ever paid a single dollar of the amount which the agreement provided that he, or the company to be formed by him, should pay. Furthermore, it will be noticed that the agreement does not provide for the surrender or cancellation of the letter of guaranty executed by Waterhouse in favor of the bank.

But, irrespective of all this, under what possible theory was this agreement admissible in evidence? It did not fall within any of the issues made by the pleadings. It certainly was not admissible in evidence to prove the facts alleged in the first separate and affirmative defense. (Record, p. 11.) That defense, in substance, avers that the money owing by Frank Waterhouse, Limited, to the Bank had been paid. This agreement, however, is not a writing showing payment, but, looking at it in a light most favorable to defendant, it is but a writing evidencing an accord and satisfaction. It is familiar law, how-

ever, that under a plea of payment an accord and satisfaction may not be shown.

Morley v. Culverwell, 7 M. & W. 174, 180.

Poer v. Johnson, 96 N. E. 189.

People's Bank v. Stewart, 117 S. W. 99, 102.

(c) The fifth and eighth assignments of error (numbered IV and VII herein) are that the Court erred in excluding a copy of the accounts between Frank Waterhouse, Limited, and the Bank, and the testimony of McEwen identifying these accounts. McEwen testified:

“Said accounts correctly set forth the amount advanced to said Frank Waterhouse, Ltd. The amounts due by Frank Waterhouse, Ltd., to the Bank at 31st October, 1903, were as follows: (1) On the current or general account £1151.17.9. (2) On the loan account £15,000 and (3) on No. 2 account £3479.13.3. These amount in all, with interest to February 15, 1907, to £22,897.16.5.” (Record, p. 35.)

It is certainly a strange and novel doctrine that the secretary of a company may not testify that such company owed on a certain date a certain sum of money and that an account, which he identifies, is a correct copy of the account between his company and its creditor.

(d) The third assignment of error (numbered II herein) is based upon the exclusion of a copy of the account between The Commercial Bank of Scotland, Ltd., and Frank Waterhouse, Ltd., said copy being attached to the assignment from the Bank to Gill. This copy of the account was made in 1907. It was excerpted from the books of the Bank and certified

to as correct by William Bamford Lang, who was the accountant at the London branch of the Bank from 1894 to 1911. (Record, p. 41.) This copy of the account was taken from the ordinary books of the Bank kept in the regular course of the Bank's business, the books at that time being in the custody and control of the Bank. (Record p. 42.) The payments shown by said accounts were actually made against checks drawn by Frank Waterhouse, Ltd. (Record p. 44), and the correctness of the accounts was never disputed by Frank Waterhouse, Ltd., or by anyone else. (Record p. 45.) The objection to the introduction of this account was based upon the fact that this copy of the account was not the best evidence of the account as shown by the books of the Bank. It may be said, in the first place, that it was not necessary to produce before the Commissioner the books of the Bank (Wigmore on Evidence, §1223). But irrespective of this, we think the defendant waived the production of the books of the Bank. The evidence was certainly relevant and material, and though it might have been incompetent because hearsay or because not the best evidence, yet, by the express stipulation of the parties, the testimony was admissible.

Respectfully submitted,

**HUGHES, McMICKEN, DOVELL & RAMSEY,
OTTO B. RUPP,**

Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN GILL, for Whom has Been Substituted MAURICE Mc-
MICKEN, Administrator With the Will Annexed of JOHN
GILL, Deceased,

Plaintiff in Error,

vs.

FRANK WATERHOUSE,

Defendant in Error,

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Northern Division.

Filed

JAN 16 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN GILL, for Whom has Been Substituted MAURICE Mc-
MICKEN, Administrator With the Will Annexed of JOHN
GILL, Deceased,

Plaintiff in Error,

vs.

FRANK WATERHOUSE,

Defendant in Error,

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

Messrs. HUGHES, McMICKEN, DOVELL &
RAMSEY, Attorneys for Plaintiff in Error,
661-670 Colman Building, Seattle, Wash-
ington.

Messrs. PRESTON & THORGRIMSON, Attorneys
for Defendant in Error,
605 Lowman Building, Seattle, Washington.

Messrs. BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant in Error,
609-616 Central Building, Seattle, Wash-
ington. [1*]

*In the Circuit Court of the United States for the
Western District of Washington, Northern
Division.*

No. 1633.

JOHN GILL,

Plaintiff,

vs.

FRANK WATERHOUSE,

Defendant.

Amended Complaint.

The plaintiff by way of amended complaint for
cause of action alleges:

I.

Duing all the times hereinafter mentioned the said
plaintiff, John Gill, was and now is a citizen and sub-

*Page-number appearing at foot of page of original certified Transcript
of Record.

ject of Great Britain residing at Edinburgh, Scotland.

II.

That during all the times hereinafter mentioned the said defendant, Frank Waterhouse, was and now is a citizen of the United States of America and the State of Washington residing at Seattle in the County of King in the said State of Washington.

III.

That during all the times hereinafter mentioned The Commercial Bank of Scotland, Limited, was and now is a corporation duly organized and existing under and by virtue of the laws of Great Britain, having its principal place of business at Edinburgh, Scotland, and during all of said times was, and now is, a citizen and subject of Great Britain.

IV.

During all the times hereinafter mentioned, Frank Waterhouse, Limited, was and now is a corporation duly organized and existing under and by virtue of the laws of Great [2] Britain and having its principal place of business at London, England.

V.

On the 16th day of February, 1899, at London, England, the said Frank Waterhouse, Limited, and the said Frank Waterhouse were desirous of obtaining from the said The Commercial Bank of Scotland, Limited, certain further advances to be made to the said Frank Waterhouse, Limited; and thereupon said The Commercial Bank of Scotland, Limited, agreed to make such further advances to the said Frank Waterhouse, Limited, upon being guar-

anted by the said defendant the payment by the said Frank Waterhouse, Limited, of advances theretofore made to the said Frank Waterhouse, Limited, and thereafter to be made to the said Frank Waterhouse, Limited, up to a sum not to exceed twenty-one thousand pounds sterling (£21,000); and thereupon and in consideration thereof the said Frank Waterhouse did then and there make, execute and deliver to the said The Commercial Bank of Scotland, Limited, his certain Letter of Guarantee in the words and figures following, to wit:

“To THE COMMERCIAL BANK OF SCOTLAND, LIMITED.

I, Frank Waterhouse, Tacoma, Washington, United States, America, hereby guarantee you payment of all sums for which Frank Waterhouse, Limited, of one hundred and forty-seven Cannon Street, London, whether on an account or accounts kept in their name in your books and operated on for them by cheques or drafts signed by two of their directors and their secretary, all for the time, or on bills, promissory notes or other obligations, are or may be liable to you, but the amount for which I shall be liable under this Guarantee shall not exceed twenty-one thousand pounds sterling with interest from the date or dates [3] at which the said Frank Waterhouse, Limited, have become or shall become indebted to you; and I declare (1) that you shall be entitled to require from me whenever you think fit, a payment or payments to account of my liability; (2) that you may grant to the said Frank Waterhouse, Limited, or to the obligants in any

bills of exchange or promissory notes, or other writings received by you from them, or in which they may be liable to you, time or other indulgence, and compound with them or such obligants, and may give up any securities which you now have or may hereafter have belonging to the said Frank Waterhouse, Limited, or to others, all without consulting me, and without affecting my obligation to you; (3) that I shall not be entitled to rank on the estate of the said Frank Waterhouse, Limited, in respect to any payment or payments to account as aforesaid, nor to have the benefit of any securities such as aforesaid until your whole claims against them are satisfied; and (4) that this guarantee is a continuing obligation and can be recalled by me only by writing and shall remain in force notwithstanding my death until recalled in writing, and shall apply to all sums for which the said Frank Waterhouse, Limited, shall become indebted to you prior to such recall.

IN WITNESS WHEREOF, These presents are subscribed by me at London on the sixteenth day of February eighteen hundred ninety-nine before these witnesses: Andrew Whitley, Manager, and William Bamford Lang, Accountant, both of your branch there.

(Signed) FRANK WATERHOUSE.

(Signed) AND. WHITLEY,

Witness,

(Signed) W. B. LANG,

Witness." [4]

VI.

That between the 18th day of March, 1898, and the 31st day of October, 1903, the said The Commercial Bank of Scotland, Limited, at the special instance and request of the said Frank Waterhouse, Limited, and this defendant, advanced the said Frank Waterhouse, Limited, on accounts kept in the name of the said Frank Waterhouse, Limited, on the books of said The Commercial Bank of Scotland, Limited, and operated on and for the said Frank Waterhouse, Limited, by checks and drafts and on bills, promissory notes and other obligations, together with interest thereon, the sum of £103217/11/11, no part of which has been paid, except the sum of £80319/15/6, so that there was thereupon due on account thereof the said The Commercial Bank of Scotland, Limited, the sum of £22897/16/5, or \$109,909.54, together with interest thereon at legal rate from the 15th day of September, 1907, no part of which has been paid; that a copy of said accounts as aforesaid is hereto attached, said accounts being marked, respectively, "General Account," "Loan Account," and "No. 2 Account," which said accounts are hereby expressly referred to and made a part of this complaint.

VII.

From time to time between the date of the inception of said accounts and the 31st day of October, 1906, the said The Commercial Bank of Scotland, Limited, at the special instance and request of the said Frank Waterhouse, Limited, and at the special instance and request of this defendant, did grant to

the said Frank Waterhouse, Limited, and to the said defendant time and indulgence upon the indebtedness and the various items thereof as more specifically set forth in each of said accounts, until the said 31st day of October, 1906; that [5] on said 31st day of October, 1906, the said Frank Waterhouse, Limited, had after demand wholly failed to pay the sum then due on account of said advances or any part thereof. Thereupon and on said 31st day of October, 1906, the said The Commercial Bank of Scotland, Limited, did make demand upon this defendant that he make immediate payment of said amount so due on account of said advances to said Frank Waterhouse, Limited, the sum being the amounts set forth in the respective accounts attached hereto, together with interest thereon upto said 31st day of October, 1906.

VIII.

That the said Frank Waterhouse, Limited, and the said defendant have refused and still refuse to pay the said amounts so due as aforesaid or any part thereof, though the same is now past due and payable.

IV.

That from time to time and at quarterly periods between the 7th day of May, 1898, and the 31st day of October, 1903, interest became due upon the amounts advanced as shown by said account attached hereto named the "Loan Account," and at said periods as the same became due, interest thereon was charged to the account of said Frank Waterhouse, Limited, and upon the books of account of

the said The Commercial Bank of Scotland, Limited, as is in each instance shown by the accounts attached hereto, marked "General Account" and "No. 2 Account"; and as said charges of interest were made in said accounts as hereinbefore set forth, statements of said account were from time to time and up to and including said 31st day of October, 1903, rendered the said Frank Waterhouse, Limited, and this defendant, and said accounts rendered as aforesaid were at said time received and assented to by the said Frank [6] Waterhouse, Limited, and this defendant.

X.

That prior to the commencement of this action, the said The Commercial Bank of Scotland, Limited, did for certain good and onerous causes and considerations assign to this plaintiff said letter of guarantee hereinbefore set forth, together with its demand against said defendant and the said plaintiff is now the owner and holder thereof.

XI.

That the value of the amount and matter in dispute in this controversy exceeds exclusive of interest and costs the sum of two thousand (2000) dollars.

WHEREFORE, Plaintiff prays judgment against the said defendant for the sum of £21,000 sterling, or to wit, the sum of \$101,640, together with his costs and disbursements herein.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff.

United States of America,
District of Washington,—ss.

W. T. Dovell, being first duly sworn, deposes and says: I am one of the attorneys for the plaintiff herein; the said plaintiff is absent from and is a nonresident of King County and the State of Washington, for which reason I make this verification on his behalf; I know the contents of the foregoing amended Complaint, and believe the same to be true.

W. T. DOVELL.

Subscribed and sworn to before me this 13th day of March, A. D. 1909.

[Seal]

E. C. HANFORD,

Notary Public in and for the State of Washington,
Residing at Seattle.

Exhibit omitted in accordance with Stipulation as to printing of record.

[Indorsed]: Amended Complaint. Filed U. S. Circuit Court, Western District of Washington. Mar. 15, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy. [7]

*In the Circuit Court of the United States for the
Western District of Washington, Northern
Division.*

No. 1633.

JOHN GILL,

Plaintiff,

vs.

FRANK WATERHOUSE,

Defendant.

Answer.

The defendant, Frank Waterhouse, answering the amended complaint, filed by the plaintiff, John Gill, herein, states:

I.

He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs numbered I and III of said amended complaint.

II.

He denies each and every allegation contained in paragraph numbered II of said amended complaint, except he admits that at the time of the commencement of this action he was and now is residing in Seattle, in the county of King, in the State of Washington.

III.

He admits that on or about the 16th day of February, 1899, he executed the Letter of Guaranty set forth in paragraph numbered V of said amended complaint. He denies each and every other allegation in said paragraph contained.

IV.

Answering paragraph numbered VI of said amended complaint [8] he denies that between March 18, 1898, and October 31, 1903, or at any other time, The Commercial Bank of Scotland, Limited, advanced to Frank Waterhouse, Limited, the sum of 103,217/11/11, or any other sum, at the instance or request of this defendant. He denies that he has any knowledge or information sufficient to form a

belief as to any of the other matters and things alleged in paragraph numbered VI of said amended complaint.

V.

Answering paragraph numbered VII of said amended complaint, he denies that The Commercial Bank of Scotland, Limited, granted to the said Frank Waterhouse, Limited, or to this defendant, time or indulgence upon the alleged indebtedness mentioned in said paragraph, at the instance and request of this defendant. He denies that he has any knowledge or information sufficient to form a belief as to whether said The Commercial Bank of Scotland, Limited, at the instance and request of said Frank Waterhouse, Limited, or at all, granted time and indulgence to the said Frank Waterhouse, Limited, until the 31st day of October, 1906, or until any time or at all. He denies any knowledge or information sufficient to form a belief as to whether said Frank Waterhouse, Limited, had, on said 31st day of October, 1906, wholly failed or failed at all to pay the sum then due on account of any advances made to it, or any part thereof. He denies each and every other allegation contained in said paragraph numbered VII.

VI.

Answering paragraph numbered VIII of said amended complaint, he denies any knowledge or information sufficient to form a belief whether said Frank Waterhouse, Limited, has refused or still refuses to pay the amounts alleged to be due from it, or any part thereof. He admits that he has refused

and still [9] refuses to pay the amount, or any part of the amount alleged in said complaint to be due from said Frank Waterhouse, Limited, to said The Commercial Bank of Scotland, Limited, and he admits that he has refused and still refuses to pay any sum whatever to the plaintiff herein. He denies each and every other allegation contained in paragraph VIII.

VII.

Answering paragraph numbered IX of said amended complaint, he denies that any statements of account in substance as therein alleged were from time to time and up to October 31st, 1903, or at any time, or at all, rendered to this defendant or received by him. He denies that he ever assented to any statement of account rendered by The Commercial Bank of Scotland, Limited, to him. He denies that he has any knowledge or information sufficient to form a belief as to any of the other matters or things alleged in said paragraph numbered IX.

VIII.

He denies that he has any knowledge or information sufficient to form a belief as to any of the matters or things alleged in paragraph numbered X of said amended complaint.

And for a first, separate and affirmative defense, defendant states:

I.

That on and prior to the alleged assignment of said Letter of Guaranty by The Commercial Bank of Scotland, Limited, to said plaintiff, the amount owing by said Frank Waterhouse, Limited, to said

The Commercial Bank of Scotland, Limited, being the money demanded in said amended complaint, was paid to said The Commercial Bank of Scotland, Limited. [10]

II.

For a second, separate and affirmative defense defendant states:

That the cause of action stated in the amended complaint of the plaintiff herein is barred by the Statute of Limitations of the State of Washington.

III.

And for a third, separate and affirmative defense defendant says:

That the cause of action set forth in said amended complaint did not accrue within three years before the commencement of this action.

IV.

And for a fourth, separate and affirmative defense defendant says:

That the cause of action set forth in said amended complaint did not accrue within six years before the commencement of this action.

V.

And for a fifth, separate and affirmative defense defendant says.

That the indebtedness alleged to be owing by said Frank Waterhouse, Limited, to said plaintiff by virtue of the assignment from said The Commercial Bank of Scotland, Limited, is upon open account; that the right of action of said plaintiff and of his assignor against said Frank Waterhouse, Limited, to recover said alleged indebtedness, and each and

every item thereof, accrued more than three years before the commencement of this action, and that said Frank Waterhouse, Limited, prior to the commencement of this action, had been, and were discharged and released from any liability therefor or thereupon by the bar of the [11] Statute of Limitations, and were not then and are not now liable for the same, or any part thereof.

VI.

And for a sixth, separate and affirmative defense, defendant states:

That at the time of the execution and delivery of said Letter of Guaranty set forth in paragraph numbered V of said amended complaint, other Letters of Guaranty of like import and of the same tenor and substance were executed and delivered to said The Commercial Bank of Scotland, Limited, by other parties, that is to say, by Alexander McNab, I. McNab, J. M. Mitchell, R. Bruck Archibald and Marshall McEwen & Co.; that each of said Letters of Guaranty were executed by said above-named persons contemporaneously with the execution of said Letter of Guaranty by this defendant, and were based upon the same consideration and were each delivered to said The Commercial Bank of Scotland, Limited, simultaneously with the delivery of the Letter of Guaranty of this defendant, and that the execution and delivery of said Letters of Guaranty by the above-named parties, and by this defendant, were parts of one and the same transaction, and to secure the same indebtedness alleged in said amended complaint, and were accepted by said The Commercial Bank of Scotland, Limited, at one and the same time

as such security; that subsequent thereto, and without the knowledge or consent of this defendant, said The Commercial Bank of Scotland, Limited, discharged and released each and all of the parties hereinabove named from any liability under their said separate Letters of Guaranty or otherwise for the debt demanded in said amended complaint.

WHEREFORE, The defendant prays that said complaint be dismissed, and that he may recover from the plaintiff his costs and reasonable disbursements herein. [12]

BOGLE & SPOONER and
HAROLD PRESTON,
Attorneys for Defendant.

United States of America,
District of Washington,—ss.

Frank Waterhouse, being first duly sworn, on oath says, that he is the defendant named in the above-entitled action, that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

FRANK WATERHOUSE.

Subscribed and sworn to before me this 3d day of March, A. D. 1910.

[Seal] F. T. MERRITT,
Notary Public in and for the State of Washington,
Residing at Seattle.

We hereby acknowledge service of the within Answer and the receipt of a true copy thereof, this 4th day of March, 1910.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff.

[Indorsed]: Answer. Filed U. S. Circuit Court, Western District of Washington. Mar. 10, 1910. A. Reeves Ayres, Clerk. By W. D. Covington, Deputy. [13]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1633.

JOHN GILL,

Plaintiff,

vs.

FRANK WATERHOUSE,

Defendant.

Reply.

Comes now the plaintiff and replies to the affirmative matter set out in the answer herein as follows:

I.

For reply to the first separate and affirmative defense, this plaintiff denies the same and each and every allegation therein contained.

II.

For reply to the second separate and affirmative defense, this plaintiff denies the same and each and every allegation therein contained.

III.

For reply to the third separate and affirmative defense, this plaintiff denies the same and each and every allegation therein contained.

IV.

For reply to the fourth separate and affirmative

defense, this plaintiff denies the same and each and every allegation therein contained. [14]

V.

For reply to the fifth separate and affirmative defense, this plaintiff admits that the indebtedness owing by said Frank Waterhouse, Limited, to said plaintiff is, by virtue of the assignment from the said The Commercial Bank of Scotland, Limited, upon open account, but denies each and every other allegation therein contained.

VI.

For reply to the sixth separate and affirmative defense, this plaintiff denies the same and each and every allegation therein contained.

WHEREFORE, this plaintiff repeats the prayer of his complaint.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff.

United States of America,
District of Washington,—ss.

W. T. Dovell, being first duly sworn, deposes and says:

I am one of the attorneys for the plaintiff herein; the said plaintiff is absent from and is a nonresident of King County and the State of Washington, for which reason I make this verification on his behalf; I know the contents of the foregoing reply, and believe the same to be true.

W. T. DOVELL.

Subscribed and sworn to before me this — day
of September, A. D. 1910.

[Seal] FRANK P. HELSELL,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within Reply received and due service of
same acknowledged this first day of September, 1910.

BOGLE & SPOONER,
Attys. for Defendant. [15]

[Indorsed]: Reply. Filed U. S. Circuit Court,
Western District of Washington. Sep. 1, 1910. A.
Reeves Ayres, Clerk. W. D. Covington, Deputy.
[16]

*In the Circuit Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1633.

JOHN GILL,

Plaintiff,

vs.

FRANK WATERHOUSE,

Defendant.

Order for Substitution of Administrator as Plaintiff.

Came on to be heard the petition of Maurice Mc-
Micken to be substituted as plaintiff in the above-
entitled cause, and it appearing to the Court that
the said John Gill died in the county of Ayr, Scot-
land, on the first day of December, 1910, being then
and there a resident of said county of Ayr, Scot-
land, and domiciled therein, and leaving a last will

and testament, and that said last will and testament has been admitted to probate in the Superior Court of King County, State of Washington, and the said petitioner, Maurice McMicken, has been appointed administrator with the will annexed of said estate of John Gill, deceased, and that the said Maurice McMicken has thereunto qualified by taking the oath and giving the bond required by the laws of the State of Washington, and is now the duly qualified and acting administrator with the will annexed of the said John Gill, deceased;

It is now, therefore, ORDERED that the said Maurice McMicken, administrator of the estate of John Gill, deceased, be and he is hereby substituted as the party plaintiff in said cause, and that said action be continued in his name as [17] plaintiff.

Done in open court this 25th day of September, A. D. 1911.

C. H. HANFORD,

Judge.

[Indorsed]: Order for Substitution of Administrator as Plaintiff. Filed U. S. Circuit Court, Western District of Washington. Sept. 25, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.
[18]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1633.

JOHN GILL, for Whom has been Substituted
MAURICE McMICKEN, Administrator
With the Will Annexed of JOHN GILL, De-
ceased,

Plaintiff,

vs.

FRANK WATERHOUSE,

Defendant.

Order of Dismissal.

The above-entitled cause came on regularly for trial before the Court and a jury duly impaneled, on the 30th day of June, 1916, the plaintiff appearing by his attorneys, Messrs. Hughes, McMicken, Dovell & Ramsey, and the defendant appearing in person and by his attorneys, Harold Preston, Esquire, and Messrs. Bogle, Graves, Merritt & Bogle, and the trial having continued from day to day, and the plaintiff having submitted to the Court and jury all of his evidence in such cause and having rested his case, and the defendant having thereupon moved the Court for a dismissal of said action, upon the grounds and for the reasons that the Court has no jurisdiction thereof, and that the evidence introduced by the plaintiff before the jury is not sufficient to warrant a verdict in favor of the plaintiff, and the Court, after due consideration, being of the opinion that the evidence submitted to the jury is

not sufficient to [19] justify a verdict in favor of plaintiff and against the defendant herein;

IT IS NOW ORDERED, ADJUDGED and DECREED that said cause be, and it is, hereby dismissed, and that the defendant recover from the plaintiff his costs and reasonable disbursements herein to be taxed by the clerk.

Plaintiff excepts to the ruling of the Court and the exception is allowed.

ORDERED and ADJUDGED in open court this 6th day of July, 1916.

JEREMIAH NETERER,
Judge.

O. K. as to form.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff.

[Indorsed]: Order of Dismissal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 12, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [20]

[Title of Court and Cause.]

Bill of Exceptions.

LODGED SEPTEMBER 30, 1916. [21]

BE IT REMEMBERED, that heretofore and on, to wit, the 30th day of June, 1916, the above-entitled cause came regularly on for trial in the above-named court before the Honorable Jeremiah Neterer, Judge of said court, sitting with a jury, plaintiff appearing by Messrs. E. C. Hughes and Otto B. Rupp, of

Hughes, McMicken, Dovell & Ramsey, his attorneys and counsel, and defendant appearing by William H. Bogle, Esq., of Bogle, Graves, Merritt & Bogle, and Harold Preston, Esq., his attorneys and counsel; and a jury having been duly impaneled and sworn to try said cause, whereupon the following proceedings were had and done, to wit:

(In this bill of exceptions the interrogatories and cross-interrogatories propounded to the witnesses are separately attached to this bill of exceptions, following the testimony and preceding the exhibits, and the answers of the witnesses only are given, reference being made to the [22] numbers of interrogatories and cross-interrogatories.)

Plaintiff offered and read in evidence the deposition of James Gill, taken before Alexander Guild, Commissioner, at Edinburgh, Scotland, as follows:

Deposition of James Gill, for Plaintiff.

(Answering Interrogatory No. 1:) "I am 28 years of age and reside at 7 Hartington Place, Edinburgh. I am a solicitor in Edinburgh, a partner of the firm of Messrs. Maxwell, Gill & Pringle, W. S., 26 Rutland Street, Edinburgh."

(Answering Interrogatories Nos. 2 and 3:) "I am an enrolled law agent in Scotland under the Law Agents Act 1873, and as such am entitled to practice as a law agent in any court of law in Scotland, and do so practice, and am familiar with the laws of Scotland."

(Answering Interrogatory No. 4:) "I knew the late John Gill during his lifetime. I was his grand-nephew, and was one of his assistants in his business

(Deposition of James Gill.)

until he died, and under his settlement he appointed me one of his executors.”

(Answering Interrogatories Nos. 5, 6 and 7:)
“The said John Gill carried on business as a solicitor in Edinburgh under the firm name of Gill & Pringle, W. S. His office address was 128 George Street, Edinburgh. He resided when in Edinburgh at Beechwood Mains, Murrayfield, Edinburgh, and had also two residences at the coast where he resided during the summer months. Between December, 1907, and the date of his death he was at one or the other of the above places. Said John Gill was a citizen of and was domiciled in Scotland. He died on December 1, 1910.”

(Answering Interrogatory No. 8:) “I have in my possession an assignation by the Commercial Bank of Scotland, Ltd., [23] incorporated by Royal Charter and Act of Parliament, in favor of the said John Gill and his heirs, executors and assignees, dated 8th October, 1907. The said assignation is signed by N. B. Gunn and Thomas W. Tod, as two of the Directors, and by Alex. Bogie as the manager of the said Commercial Bank of Scotland Ltd. The said assignation assigned to said John Gill the letter of guarantee granted by Frank Waterhouse, therein designated ‘sometime Merchant, Tacoma, Washington, United States of America, now shipping agent, Seattle, United States of America,’ dated 16th February, 1899, whereby the said Frank Waterhouse guaranteed payment of all sums for which Frank Waterhouse, Ltd., should be liable to

(Deposition of James Gill.)

the bank, but the amount for which he should be liable under said guarantee should not exceed £21,000 sterling with interest. On 15th February, 1907, the liability of Frank Waterhouse, Ltd., to the said bank was £22,897:16:5. This debt was paid to the said bank by the said John Gill and [the said bank also by said assignation assigned to the said John Gill and his heirs, executors or assignees, their claim to said sums with interest thereon against the said Frank Waterhouse, but to the extent of £21,000 sterling only of principal with interest on said sum of £21,000 from 31st October, 1903.]”

The words in brackets were stricken out on the objection of defendant that the witness was testifying simply to the contents of a written instrument; to which ruling of the Court plaintiff excepted and his exception was allowed. [24]

The reading of the deposition thereupon proceeded as follows:

(Answering Interrogatories Nos. 9 and 10:) “I have the said assignation in my possession and have attached same to my deposition. I have marked it Exhibit ‘B’ and have signed a docquet thereon. The said assignation is properly executed on behalf of the said Commercial Bank of Scotland, Ltd., under the law of Scotland. [It conveys to the said John Gill, his heirs, executors or assignees, what by its terms it purports to convey and is in all respects valid and effectual according to the laws of Scotland.]”

The portion in brackets was received in evidence

(Deposition of James Gill.)

over defendant's objection that it is the conclusion of the witness, not evidence of a fact, and is a conclusion of law which must be made by the Court, not the witness.

(Answering Interrogatory No. 11:) "The Bankers Books Evidence Act 1879, 42 Vict. Chap. 11, states in detail the law of Great Britain, including Scotland, relative to the admission in evidence of copies of entries from Bankers' Books. A copy of said Act of Parliament is attached to my deposition and I refer to the Act for its terms. I have marked it Exhibit 'A' and have signed a docquet thereon."

A certified copy of said Bankers Book Evidence Act was thereupon offered in evidence by plaintiff, but upon objection of defendant was excluded, and an exception allowed to plaintiff. A copy whereof is attached hereto as Exhibit "H" and made a part hereof. [25]

The reading of the deposition thereupon proceeded as follows:

(Answering Interrogatory No. 12:) "The late Mr. Gill died on 1st December, 1910. By his holograph settlement he appointed Mr. James Wood Fergusson, 5 Hatton Place, Edinburgh; the Rev. Robert Sinclair, Roslin, Newlands, Glasgow, and myself, and the survivors and survivor of them and me, to be his executors. Mr. James Wood Fergusson predeceased the said John Gill, and the Rev. Robert Sinclair and I accepted office as executors aforesaid, completed the title to his estate and entered upon the possession and management of his

(Deposition of James Gill.)

estate. In terms of said appointment the assignation by the Commercial Bank of Scotland, Ltd., in favor of the said John Gill and his heirs, executors or assignees, was carried to the said Rev. Robert Sinclair and myself as the surviving executors of the said John Gill."

Cross-examination.

(Answering Cross-Interrogatory No. 1:) "The late John Gill was a solicitor in Edinburgh, and a customer of the Commercial Bank of Scotland, Ltd. This was the only connection he had with said bank. I believe he first opened an account with said bank on 9th August, 1882, and it subsisted until the date of his death with the exception of a period between July, 1891, and October, 1905, when, so far as I can discover, he did no business with said bank."

(Answering Cross-Interrogatory No. 2:) "The principal assignation came into my possession recently. The late John Gill sent it to Messrs. Hughes, McMicken, Dovell & Ramsey, of Seattle, U. S. A., some years ago for the purposes of this action and it was returned by them for the purpose of being [26] deponed to in connection with this action."

(Answering Cross-Interrogatory No. 3.) "The late Mr. Gill at the time of his death did not hold or have in his possession an assignment or transfer to him or to any other person of the letter or letters of guarantee by Alexander McNab, John McNab, R. B. Archibald, Marshall McEwen & Co., or John M. Mitchell. The letters of guarantee by these parties were in his possession but they had not been assigned

(Deposition of James Gill.)

or transferred to him. The late John Gill had no other document, writing, assignation, transfer or conveyance relating to the indebtedness of Frank Waterhouse, Ltd.”

(Answering Cross-Interrogatory No. 4:) “I am, as already explained, one of the executors of the late John Gill, and as such I am entitled to the possession of all documents belonging to him. The assignation by the Commercial Bank of Scotland, Ltd., in favor of the late John Gill, referred to in direct interrogatory No. 8, was sent by him to Messrs. Hughes, Mc-Micken, Dovell & Ramsey, some time before his death in connection with the proceedings raised by him against Frank Waterhouse. They returned the assignation last year in order that I might produce it before the Commissioner. I have no direct personal knowledge of the initiation of the transaction between the late John Gill and the Commercial Bank of Scotland, Ltd., but my understanding is that the bank were desirous that the debt due by Frank Waterhouse, Ltd., should be repaid and that Mr. Alexander McNab, who was one of the guarantors and who was not, I understand, in a position to meet the guarantee if it were enforced against him, approached the late John Gill as a friend and asked him to take over the debt; that the late John Gill agreed to do so, and paid off the debt, which amounted to £22,897:16:5, and [27] obtained the assignation before mentioned by the Commercial Bank of Scotland, Ltd., in favor of himself as an individual, in consideration of said payment by him to the bank, and that the payment was made by

(Deposition of James Gill.)

cheque or cheques by the late John Gill. I have not been able to find the cheque or cheques among the late John Gill's papers."

(Answering Cross-Interrogatory No. 5:) "So far as I have discovered there were not any outstanding accounts, bills or notes between the late John Gill and Alexander McNab relating to the business of Frank Waterhouse, Ltd., with the Commercial Bank or to the letter of guarantee of Frank Waterhouse. I have found among the trust papers certain documents relating to the assignation by the bank and to the present suit, but these did not contain any record of any transaction with Mr. McNab in relation thereto. A copy was kept of the late Mr. Gill's correspondence in connection with the assignation of the guarantee in his favor and the instructions given to his solicitors in America, and a record was kept of such correspondence and of meetings. For the sake of identification this record was kept under the heading of Alex. McNab, Frank Waterhouse or Frank Waterhouse, Ltd. Mr. McNab's name was used as the matter was first brought to the late Mr. Gill's notice by him. Mr. Waterhouse's name was used as he was primarily concerned as defender in the suit. I have not been able to discover any evidence that Mr. McNab made any payment to the late John Gill or to the Commercial Bank of Scotland, Ltd., for the said assignation except in a letter addressed by the late John Gill to Messrs. Hughes, McMicken, Dovell & Ramsey, dated 23rd April, 1908, where it is stated that 'Alexander McNab has paid

(Deposition of James Gill.)

£297 and interest to account £778.' I have been [28] unable to check the receipt of these payments by the late John Gill and I have no evidence other than the statement in said letter that Mr. McNab made the foresaid payments of £397 and £778. I have no knowledge of any agreement, written or verbal, between the late John Gill and Alexander McNab or any other person of the nature referred to in this interrogatory. The executors of the late John Gill reserve any right competent to them in the event of their not recovering the whole of the debt under this suit to obtain from the Commercial Bank of Scotland, Ltd., an assignation or assignations to the guarantees granted by the said Alexander McNab and others and to recover from them."

(Answering Cross-Interrogatory No. 6:) "The late John Gill has acted as solicitor for Mr. McNab during the period from 1900 to the date of his death. I believe that the late John Gill did only a small portion of Mr. McNab's legal business and that Mr. McNab during that period consulted other solicitors both in Scotland and England."

The plaintiff thereupon offered and (over defendant's objection) read in evidence the deposition of James Lawson Anderson, taken before Alexander Guild, Commissioner, at Edinburgh, Scotland, as follows:

(The defendant had in due season moved to suppress this deposition for certain alleged defects in the taking thereof, which was overruled by the Court, the defendant excepting.)

Deposition of James Lawson Anderson, for Plaintiff.

(Answering Interrogatories Nos. 1, 2 and 3:)

“My name is James Lawson Anderson. I am 64 years of age and I reside at 45 Northumberland Street, Edinburgh. I am the secretary [29] of the Commercial Bank of Scotland, Ltd., Edinburgh. I am acquainted with the Commercial Bank of Scotland, Ltd., and am secretary of said bank and have been for nine years.”

(Answering Interrogatories Nos. 4, 5 and 6:)

“The Commercial Bank of Scotland, Ltd., was incorporated as a corporation by Royal Charter granted at London by King William IV on 5th August, 1831. The bank carries on the business of banking in all its branches. Its principal place of business is at 14 George Street, Edinburgh.”

(Answering Interrogatory No. 7:) “I attach to my deposition, marked Exhibit ‘A,’ copy of Warrant for Charter certified under my hand to be a true copy. I have no seal of office.”

The plaintiff thereupon offered the said Charter in evidence, a copy of which is hereto attached, marked Exhibit “A” and made a part hereof.

The reading of the deposition thereupon proceeded as follows:

(Answering Interrogatory No. 8:) “The great majority of the stockholders of the bank on 1st January, 1897, were resident in Scotland and have since then been continuously resident therein:

(Answering Interrogatories Nos. 9 and 10:) “I am aware that accounts were kept at the London

(Deposition of James Lawson Anderson.)

office of the bank in the name of Frank Waterhouse, Ltd. The amount due to the bank by Frank Waterhouse, Ltd., on the said accounts was paid to the bank by John Gill, solicitor Supreme Courts, Edinburgh, and the bank granted an assignation in his favor of the amount so paid and of the guarantee by Frank Waterhouse in favor of [30] the bank. The assignation was granted on 8th October, 1907."

(Answering Interrogatory No. 11:) "The assignation by the bank in favor of the said John Gill, dated 8th October, 1907, has been exhibited to me. I have signed a docquet on this assignation to identify it. It is signed by N. B. Gunn and Thomas W. Tod, Directors, and by Alexander Bogie, Manager of said Commercial Bank of Scotland, Ltd. I recognize and can identify each of the signatures to said assignation as being the true signatures of Neil Ballingall Gunn and Thomas Wordie Tod, two of the directors of the bank, and of Alexander Bogie, the manager of the bank."

(Answering Interrogatory No. 12:) "The said Neil Ballingall Gunn and Thomas Wordie Tod were duly qualified and acting directors, and the said Alexander Bogie was the duly qualified and acting manager of the Commercial Bank of Scotland, Ltd., at the time the assignation was executed."

(Answering Interrogatory No. 13:) "The said Neil Ballingall Gunn and Thomas Wordie Tod, as directors, and the said Alexander Bogie, as manager, were duly authorized to execute said assignation on behalf of said Commercial Bank of Scotland, Ltd."

(Answering Interrogatories Nos. 14 and 15:) "A

(Deposition of James Lawson Anderson.)

letter was written by me for the Commercial Bank of Scotland, Ltd., to Frank Waterhouse, relative to the accounts of Frank Waterhouse, Ltd., on 31st October, 1906, and I append a copy of said letter to my deposition as Exhibit 'B'."

At this point the original of said letter was demanded of and produced by the defendant, and was offered and received in evidence as Plaintiff's Exhibit "C." A copy thereof is hereto attached and made a part of this bill of [31] exceptions as such exhibit.

Plaintiff thereupon offered in evidence the assignation identified by the witnesses Gill and Anderson, a copy of which assignation is hereto attached, marked Exhibit "D" and made a part hereof.

Defendant objected to this assignment, on the ground that the instrument offered in evidence does not purport to assign the debt of the bank against Frank Waterhouse, Ltd. Ruling was reserved on this objection.

Defendant also objected to the reception in evidence of the statement of account attached to the alleged assignment, and ruling on this objection was reserved.

The defendant waived the cross-examination, and thereupon the plaintiff offered it in evidence.

Cross-examination.

(Answering Cross-Interrogatories Nos. 1 and 2:)
"Alexander McNab was not a shareholder in said bank during the period mentioned or any part thereof. The debt to the bank and the letter of

(Deposition of James Lawson Anderson.)

guarantee by Frank Waterhouse were assigned by written instrument. (Plaintiff's counsel here admitted the "written instrument" here referred to was said Exhibit "D.") The bank also held letters of guarantee by Alexander McNab, John McNab, R. B. Archibald, Marshall McEwen & Company, and the partners thereof, and John M. Mitchell. These guarantees have not been assigned or transferred by this bank, but on payment being made by John Gill they were sent to him. John McNab is dead. I don't know the date of his death. A note of the bank's claim under the guarantee was sent to the [32] law agents acting for his representatives on 19th January, 1903. The other guarantors are alive, so far as I know. No release appears to have been granted by the bank to any of the said guarantors."

(Answering Cross-Interrogatory No. 4:) "The payment of £22,897:16:5 was made to the bank by the said John Gill in exchange for the assignation in his favor. The payment was made by a cheque of his own, I understand. I have not the particulars of the cheque."

This answer was received in evidence over the objection of the defendant that it was evidently hearsay,—the Court reserving its ruling thereon and upon defendant's motion to strike same.

(Answering Cross-Interrogatory No. 5:) "As already stated, I did not participate in the negotiations leading up to the execution of the assignation to the said John Gill and have no knowledge of any understanding, agreement or contract, written or verbal, between the defendant, John Gill and Alex-

(Deposition of James Lawson Anderson.)

ander McNab, or between John Gill and Alexander McNab. There was no understanding, agreement or contract, written or verbal, in regard to this matter between the bank and Alexander McNab.”

This answer was received in evidence over the objection of the defendant that it was evidently hearsay,—defendant excepting.

(Answering Cross-Interrogatory No. 6:) “To the best of my knowledge no payment was made or bill or note granted to the bank by Alexander McNab at the time or subsequent to the execution of said assignation. I am not in a position to speak as to the payments to John Gill, if any. I do not know what interest John Gill had in paying up the advance and [33] taking an assignation of the said guarantee. He did not ask for an assignation of the other guarantees, so far as I am aware.”

(Answering Cross-Interrogatory No. 7:) “The other guarantees were delivered to the said John Gill.”

(Answering Cross-Interrogatory No. 8:) “I have no recollection whether the Commercial Bank of Scotland, Ltd., was notified of the execution of the memorandum of agreement between Frank Waterhouse and Frank Waterhouse, Ltd., on or about 6th October, 1900. I know nothing about the bonds referred to. I do not know when Frank Waterhouse, Ltd., ceased active business. Frank Waterhouse, Ltd., transacted its banking business with the London office of the bank, and this is information which they alone would be in a position to give.”

(Deposition of James Lawson Anderson.)

(Answering Cross-Interrogatory No. 9:) "I do not know whether demands for payment were made upon Frank Waterhouse, Ltd., and the officials of that company prior to 31st October, 1906. I can find no record of payment having been called for from the other guarantors and I am unable to say now why that was not done. The letter of 31st October, 1906, although signed by me, was not written on my instructions. Alexander McNab was a customer of the bank during the period mentioned and was reputed wealthy. He resided mostly, I think, at Middleton Kerse, Menstrie. He was a distiller and a director of public companies. The other guarantors, with the exception of Frank Waterhouse, were resident in England or Scotland at the time the guarantees were granted. They do not all appear to have been engaged in business." [34]

The plaintiff thereupon offered and read in evidence the deposition of William McEwen, taken before W. H. Quarrell, Commissioner, at London, England, whose testimony was as follows:

Deposition of William McEwen, for Plaintiff.

(Answering Interrogatory No. 1:) "My name is William McEwen. I am 45 years of age and I reside at the Spa Hotel, Tunbridge Wells. I am a chartered accountant."

(Answering Interrogatory No. 2:) "I am acquainted with the corporation called Frank Waterhouse, Limited. I was the Secretary of this company until it went into voluntary liquidation when I

(Deposition of William McEwen.)

was appointed the liquidator. I am still liquidator of the company."

(Answering Interrogatory No. 3:) "I have no copy of the charter of articles of incorporation of the company among my papers."

(Answering Interrogatory No. 4:) "The directors of the company from time to time were Alexander McNab, John M. Mitchell, R. Bruce Archibald, Frank Waterhouse and Charles Richardson. The secretary of the company was John M. Mitchell until August, 1898, when I was appointed secretary."

(Answering Interrogatory No. 5:) "I have examined the copy of the accounts of Frank Waterhouse, Ltd., with the Commercial Bank of Scotland, Ltd., appended to the deposition of George Sutherland Coutts, taken on the 17th December, 1913, and I am satisfied that said accounts correctly set forth the amount advanced to said Frank Waterhouse, Ltd. The amounts due by Frank Waterhouse, Ltd., to the Bank at 31st October, 1903, were as follows: (1) On the current or general account £1151.17.9. (2) On the loan account £15,000 and (3) on No. 2 account £3479. 13. 3. These amount in all, with interest to February 15, 1907, to £22,897. 16. 5." [35]

The defendant objected to this answer on the ground that it was hearsay, was not the best evidence of the transactions, was not the proper way to prove book entries, the books nor said account therein have not been proved. The Court reserved ruling on the objection until the close of plaintiff's case.

(Answering Interrogatories Nos. 6 and 7:) "The said accounts correctly shew the manner and the

(Deposition of William McEwen.)

amounts in which said accounts of Frank Waterhouse, Ltd., were operated upon by cheques. The amounts shewn by said accounts to have been paid out for the benefit of Frank Waterhouse, Ltd., were actually so paid.

(Answering Interrogatory No. 8:) "I have not in my possession the cheques drawn upon the loan account. I have the cheques which operated on the current or general account and No. 2 account, but as liquidator of the company I cannot part with them. I have compared them with the copy accounts marked A, B and C appended to the said deposition of Mr. George Sutherland Coutts, and they agree with the figures stated in that account."

(Answering Interrogatory No. 9:) "The advances made to Frank Waterhouse, Ltd., were made at the instance and request of the board of directors of the company."

(Answering Interrogatory No. 10:) "Demands were made upon the Company and numerous verbal demands were made upon the directors and secretary by the bank for payment of the indebtedness shewn to be due by the company by said accounts."

(Answering Interrogatories Nos. 11 and 12:) "No. payments have been made by the company since 31st October, 1903. I should explain that on 7th April, 1908, I was appointed the voluntary liquidator of the company at an extraordinary [36] general meeting of the shareholders held on that date. (Subsequently I wrote to the Commercial Bank of Scotland, Ltd., intimating my appointment and asking them to send me a certified statement of their claims in the

(Deposition of William McEwen.)

liquidation. They informed me that the company's indebtedness to them has been settled by Mr. John Gill, S. S. C. Edinburgh, and that they had assigned their claim to him.) Mr. Gill subsequently rendered his claim to me as liquidator of the company and I admitted the claim. I have paid to the said John Gill, and after his death to his executors, dividends in respect of Mr. Gill's claim in the liquidation. The sums which I have paid to him and them to date amount to £2924. 17. 4."

The defendant moved to strike that part of the answer to interrogatory No. 12 which is in brackets, because hearsay, and the Court reserved its ruling thereon.

Cross-examination.

(Answering Cross-Interrogatory No. 1:) "Frank Waterhouse, Ltd., was incorporated in December, 1897. I do not know who were the original incorporators. Alexander McNab, Frank Waterhouse and Jahn Mitchell Mitchell were the original shareholders. The following became shareholders on 31st March, 1898:—John Marshall, John McNab and Bruce Archibald. On 14th April, 1898, O. J. Trinder became a shareholder and on 10th February, 1899, Charles Richardson became a shareholder."

(Answering Cross-Interrogatory No. 2:) "The company was engaged in transport and insurance business. The business of the company was principally conducted in Seattle and Tacoma. The registered office of the company was situated in London, England."

(Deposition of William McEwen.)

(Answering Cross-Interrogatory No. 3:) "I became secretary [37] of the company in August, 1898. I had no relation with the company prior to that time. I had no business relationship with Alexander McNab at the time when I became secretary of the company. I have since then been secretary and auditor of one or two companies in which Mr. McNab is interested as a director or otherwise."

(Answering Cross-Interrogatory No. 4:) "Frank Waterhouse, Ltd., ceased active business operations in America about October, 1900, and was formally liquidated by the shareholders on 7th April, 1908."

(Answering Cross-Interrogatory No. 5:) "I am the William McEwen who executed on 6th October, 1900, on behalf of the company, the memorandum of agreement, a copy of which is to these answers attached. I was authorized to enter into said memorandum of agreement by the board of directors."

Defendant thereupon offered said copy of agreement so attached, to which the plaintiff objected as irrelevant and immaterial, the Court reserving its ruling; said copy being hereto attached, marked Exhibit "I" and made a part hereof.

(Answering Cross-Interrogatory No. 6:) "Frank Waterhouse, Ltd., after the said memorandum of agreement was signed, ceased to carry on any active business operations in America, but the company continued in existence until 1908, when it was formally liquidated by the shareholders."

(Answering Cross-Interrogatory No. 7:) "The indebtedness of Frank Waterhouse, Ltd., to the

(Deposition of William McEwen.)

Commercial Bank of Scotland, Ltd., on 6th October, 1900, was £19,613. 9. 8, exclusive of accrued interest."

(Answering Cross-Interrogatory No. 8:) "I have no recollection now whether the Commercial Bank of Scotland, Ltd., were [38] notified of the said memorandum of agreement. The bonds of Frank Waterhouse & Co. were lodged with the bank for safe custody. Mr. Alexander McNab was informed of the contents of said agreement on or about 6th October, 1900. A summary of the agreement was submitted to Mr. McNab."

(Answering Cross-Interrogatory No. 9:) "Nothing was withheld from the Commercial Bank of Scotland, Ltd."

(Answering Cross-Interrogatory No. 10:) "There were three separate accounts in the name of Frank Waterhouse, Ltd., with the Commercial Bank of Scotland, Ltd. One was known as the 'Loan Account,' and the other known as 'No. 2 Account,' and the third was the 'Current or General Account.' "

(Answering Cross-Interrogatories 11, 12 and 13:) "I have no recollection of having seen the guarantees. I understand the general account was secured by a guarantee by Mr. McNab and Mr. Mitchell."

(Answering Cross-Interrogatory No. 14:) "Numerous advances were made subsequent to 6th October, 1900, and on the other hand sums were lodged to the credit of the accounts after that date. These are shown in the accounts appended to the deposition of George Sutherland Coutts."

Defendant moves to strike this answer, because

(Deposition of William McEwen.)

hearsay, and not responsive to the question. Motion denied, defendant excepting.

(Answering Cross-Interrogatory No. 15:) "I have no recollection of having seen the guarantees referred to." [39]

The plaintiff thereupon offered in evidence the copy of accounts identified by the witness William McEwen, which was identified as Plaintiff's Exhibit "E," a copy of which is hereto attached, marked exhibit "E" and made a part hereof.

The defendant objected to the same, because not proper evidence and incompetent, irrelevant and immaterial, no proof books correctly kept or that the entries were contemporaneous with the transactions, or of the person making them that they were correctly made, or that such person had any knowledge of the transactions, or that the books were the books of the bank or current books kept in the ordinary current business of the bank, and upon the further ground that the witness had no personal knowledge of the transactions, and therefore his testimony is hearsay.

The Court reserved its ruling on the objection.

Deposition of William Bamford Lang, for Plaintiff.

Plaintiff thereupon offered and read in evidence the deposition of William Bamford Lang, taken before Alexander Guild, Commissioner, at Edinburgh, Scotland, which deposition was as follows:

(The defendant had also moved in due season to suppress this deposition for certain alleged defects

(Deposition of William Bamford Lang.)

in its taking, which motion was overruled, the defendant excepting.)

The defendant objected to the reading of the deposition on the same grounds, viz.: The witness is not the person named in the commission, and the deposition was taken before an officer in Edinburgh, whereas the commission directed it to be taken in London before a different officer.

(Answering Interrogatories Nos. 1, 2 and 3:) “My name is William Bamford Lang—not William Bamford Laing as stated in [40] the interrogatories addressed to me. I am 55 years of age, and I reside at 22 Sardinia Terrace, Glasgow. I am an assistant agent in the Commercial Bank of Scotland, Ltd., and am acquainted with said bank.

“I am assistant agent in the Glasgow office of the Commercial Bank of Scotland, Ltd. I have been associated with the Commercial Bank of Scotland, Ltd., since 1876. I was securities clerk, 1890 to 1894, and accountant, 1894 to 1911, in the London office.”

(Answering Interrogatory No. 4:) “I recollect that when I was in the London office of the bank, Frank Waterhouse, Ltd., conducted business with that bank. I have not, however, seen these accounts for some years. The assignation by the Commercial Bank of Scotland, Ltd., in favor of John Gill, S. S. C. Edinburgh, dated 8th October, 1907, has, however, been exhibited to me and I have examined the accounts appended thereto, and find that they are excerpted from the books of the bank and certified by

(Deposition of William Bamford Lang.)

me as correct. I have signed a docquet on this account to identify it."

This answer was read over the objection and exception of the defendant, because not responsive to the question, the witness did not testify from his own knowledge but from hearsay, and the other grounds stated in objection to the account itself.

(Answering Interrogatories Nos. 5 and 6:) "The accounts were kept by the ledger clerks employed in the London office from time to time. They were kept upon the regular books of the Commercial Bank of Scotland, Ltd., and the entries in said accounts were made in the regular course of business of said bank."

(Answering Interrogatory No. 7:) "I have examined the [41] accounts attached to the said assignment by the Commercial Bank of Scotland, Ltd., in favor of the said John Gill, and they are full copies of the accounts of Frank Waterhouse, Ltd., taken from the books of the bank. They are certified correct by me, and the books from which they were taken were the ordinary books of the bank kept in the regular course of the bank's business and they were in the custody and control of the bank."

This answer was received over the objection and exception of the defendant on the ground that it was hearsay, that witness did not make the entries, had no personal knowledge of them, they were not kept under his supervision, and upon the grounds of objection theretofore made to the account itself.

(Answering Interrogatory No. 8:) "I am not in a

(Deposition of William Bamford Lang.)

position to refer to the books of the London office of the bank where the accounts are kept. The indebtedness to the bank was not repaid until 15th February, 1907, and the interest on the said advances was allowed to accumulate until said date. At that date the interest payable was as follows: On the current or general account the interest payable was £191:17. On the loan account the interest payable was £2471:18:2. On No. 2 account the interest payable was £602:10:3. The position accordingly on 15th February, 1907, was that Frank Waterhouse, Ltd., were due to the Commercial Bank of Scotland, Ltd., including interest, the sum of £22,897:16:5."

(Answering Interrogatory No. 9:) "The sums advanced by the Commercial Bank of Scotland, Ltd., were advanced against cheques drawn by Frank Waterhouse, Ltd., upon the Commercial Bank of Scotland, Ltd."

(Answering Interrogatory No. 10:) "I refer to the accounts [42] appended to the said assignation by the Commercial Bank of Scotland, Ltd., in favor of the said John Gill, which shows the dates and amounts of all the deposits and withdrawals."

The answer to Interrogatory No. 10 was received over the objection and exception of the defendant upon the same grounds as No. 7.

(Answering Interrogatories Nos. 11 and 12:) "The accounts were operated on by Frank Waterhouse, Ltd., by cheque. The cheques were signed by two directors and by the secretary of Frank Waterhouse, Ltd."

(Deposition of William Bamford Lang.)

(Answering Interrogatory No. 13:) "The original cheques were returned to Frank Waterhouse, Ltd., from time to time in accordance with the custom of the bank. The cheques on the loan account were retained by the bank."

(Answering Interrogatory No. 14:) "I have no cheques in my possession."

(Answering Interrogatory No. 15:) "The payments shown by said accounts were actually made against cheques drawn by Frank Waterhouse, Ltd."

(Answering Interrogatory No. 16:) "I have no knowledge now at whose request the advances to Frank Waterhouse, Ltd., were made."

(Answering Interrogatory No. 17:) "Interest on the advances were charged against the current or general account and No. 2 account periodically. These interests will be found debited in the current or general account under dates 7th May, 1898; 10th September, 1898; 31st October, 1898; 4th February, 1899; 6th May, 1899; 30th October, 1899; 26th February, 1900; 5th May, 1900; 3d August, 1900; 27th October, 1900; 31st October, 1900; 1st February, 1901; 30th April, 1901; 3d August, [43] 1901; 28th October, 1901; 31st October, 1901; 7th February, 1902; 28th April, 1902; 2d August, 1902; 27th October, 1902; 31st October, 1902; 7th February, 1903; 2d May, 1903; 1st August, 1903; and 31st October, 1903. The interests debited in No. 2 account will be found under dates:—31st October, 1901; 31st October, 1902 and 31st October, 1903. These interests were also debited in the bank pass-book of Frank Waterhouse, Ltd.,

(Deposition of William Bamford Lang.)
and were thus directly brought to their notice.”

(Answering Interrogatory No. 19:) “The correctness of the accounts was never disputed by Frank Waterhouse, Ltd., or by anyone else.”

Cross-examination.

(Answering Cross-Interrogatory No. 1:) “I was head securities clerk from 1890 to 1894, and accountant from 1894 to 1911 in the London office, and since 1911 have been assistant agent in Glasgow.”

(Answering Cross-Interrogatory No. 2:) “I recollect that Frank Waterhouse, Ltd., transacted banking business with the Commercial Bank of Scotland, Ltd., and obtained cash advances from the bank. My recollection has been refreshed by an examination of the accounts appended to said assignation by the Commercial Bank of Scotland, Ltd., in favor of said John Gill.”

(Answering Cross-Interrogatory No. 3:) “Mr. Alexander McNab was a customer of the bank when the account with Frank Waterhouse, Ltd., was opened, and still is a customer.”

(Answering Cross-Interrogatory No. 4:) “I am not aware that the advances to Frank Waterhouse, Ltd., were primarily made upon the credit of Alexander McNab. They were made on the following guarantees, viz.: (1) Letter of Guarantee by [44] Frank Waterhouse, Ltd., of 147 Cannon Street, London; Alexander McNab of Middleton Kerse, Menstrie, Clackmannanshire; John McNab of Swinton, Berwickshire; Robert Bruce Archibald, Devondale, Tillicoultry; and Messrs. Marshall McEwen & Com-

(Deposition of William Bamford Lang.)

pany, wine merchants, 146 St. Vincent Street, Glasgow, and John Marshall and Patrick McEwen, the partners of that firm as such and as individuals, for £15,000; (2) Letter of Guarantee by the said Alexander McNab, Robert Bruce Archibald and John Mitchell Mitchell, Solicitor, 147 Cannon Street, London, for £5,000; (3) Letter of Guarantee by the said Alexander McNab and John Mitchell Mitchell for £1,000; and (4) Letter of Guarantee by Frank Waterhouse, merchant, Tacoma, Washington, United States of America, for £21,000 and interest.

(Answering Cross-Interrogatory No. 5:) "The advances made by the bank to Frank Waterhouse, Ltd., were made under separate accounts. One of these accounts was known as the loan account and £15,000 was advanced to Frank Waterhouse, Ltd., by the bank on this account. Another account was known as No. 2 account and £5,000 was advanced to Frank Waterhouse, Ltd., by the bank on this account. The other account was the current or general account of Frank Waterhouse, Ltd."

(Answering Cross-Interrogatory No. 6:) "The bank received no security except the letters of guarantee before mentioned granted by the said Frank Waterhouse, Ltd., Alexander McNab, John McNab, Robert Bruce Archibald, Marshall McEwen & Company, and the individual partners thereof, John Mitchell Mitchell and Frank Waterhouse."

(Answering Cross-Interrogatory No. 7:) "The addresses of the various guarantors have been heretofore stated in my answer. Mr. Frank Waterhouse

(Deposition of William Bamford Lang.)

is a merchant. Mr. Alexander McNab is a director of companies. John McNab is, I understand, [45] dead. I don't know the occupation of Robert Bruce Archibald. Messrs. Marshall McEwen & Company are wine merchants, and John Mitchell Mitchell is a solicitor."

(Answering Cross-Interrogatory No. 10:) "So far no information about Robert Bruce Archibald. I don't know whether he is now living or dead. So far as I know, the bank has done nothing to release him or his estate."

(Answering Cross-Interrogatory No. 9:) "I understand that John McNab is dead. I don't know when he died or where his estate is located and administered. So far as I know, the bank has done nothing to release him or his estate."

(Answering Cross-Interrogatory No. 10:) "So far as I know, the bank has done nothing to release the said John Mitchell Mitchell."

(Answering Cross-Interrogatory No. 11:) "So far as I know, the bank has done nothing to release Alexander McNab and Marshall McEwen & Company of their guarantees."

(Answering Cross-Interrogatory No. 12:) "I have no recollection of a memorandum of agreement between Frank Waterhouse & Co., and Frank Waterhouse, Ltd., dated October, 1900."

(Answering Cross-Interrogatory No. 13:) "For advances made by the bank to Frank Waterhouse, Ltd., subsequent to the agreement of October, 1900, I refer to the accounts appended to the assignation

(Deposition of William Bamford Lang.)

by the Commercial Bank of Scotland, Ltd., in favor of said John Gill."

(Answering Cross-Interrogatory No. 14:) "I had no negotiation with any party regarding the assignation of the claim by the bank. This was all arranged by the head office in Edinburgh and at the time I was in the London office. The advances were repaid by the late Mr. John Gill, S. S. C., Edinburgh." [46]

(Answering Cross-Interrogatory No. 15:) "I am unable to answer this question as these matters, if dealt with, would be carried out by the head office of the bank."

(Answering Cross-Interrogatory No. 16:) "I do not know what relation the said John Gill bore to the Commercial Bank of Scotland, Ltd., from the year 1898, to the date of his death."

Each of the foregoing depositions was taken under a stipulation, a copy of which is attached to this bill of exceptions immediately preceding the interrogatories and cross-interrogatories attached hereto.

The plaintiff thereupon offered in evidence Chapter 338 of the Acts of Congress of the First Session of the Fifty-sixth Congress of the United States, as follows:

"An Act to provide an American register for the steamship 'Garonne.'

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Commissioner of Navigation is hereby authorized and directed to cause the foreign-built steamship 'Garonne,' owned by Charles

(Deposition of William Bamford Lang.)

Richardson, of Tacoma, State of Washington, and Frank Waterhouse, of Seattle, State of Washington, *citizens of the United States*, to be registered as a vessel of the United States.

“Approved April 27th, 1900.”

To the introduction of this Act the defendant objected on the ground the recitals in the Act are not proof of any fact in litigation between two private individuals. The Court reserved its ruling on the objection. [47]

Plaintiff further offered in evidence a certified copy of the articles of incorporation of Frank Waterhouse & Company, Incorporated, dated the 6th of October, 1900, bearing upon the citizenship of Mr. Waterhouse. A true copy thereof is hereto attached, marked Exhibit “F” and made a part hereof.

Plaintiff further offered in evidence the oath of registry, subscribed and sworn to by Frank Waterhouse before S. B. House, deputy collector of customs, on the 10th of May, 1900, for the purpose of securing American registry of the steamship “Garonne,” and in which he swears that he is a citizen of the United States and not a subject of any foreign power; a copy of which is hereto attached, marked Exhibit “G” and made a part hereof.

Plaintiff further offered in evidence a certified copy of an oath as director of the Boston National Bank, subscribed by Frank Waterhouse on January 26, 1903, before Geo. F. Begg, a notary public, in which he swears that he is a citizen of the United

States; a copy of which oath is hereto attached, marked Exhibit "F" and made a part hereof.

Motion for Nonsuit or Dismissal of Plaintiff's Action.

Plaintiff having rested, the defendant moved for a nonsuit or dismissal of plaintiff's action, for the reasons:

"First. That under the testimony and the pleadings the Court has no jurisdiction of the action; and

Second. Because the testimony introduced is not sufficient to warrant a verdict in favor of the plaintiff." [48]

After argument of counsel, the Court denied the first ground of said motion, but granted the second ground thereof; and ordered and directed that the cause be withdrawn from the jury, and judgment of dismissal be entered herein; to which order of the Court the plaintiff excepted, and his exception was allowed.

Oral Opinion on Motion for Nonsuit, etc.

In rendering its decision in sustaining said motion on the second ground thereof, the Court delivered the following oral opinion:

"I believe that this guarantee that was executed by the defendant, agreeing to pay the past due obligation of the Waterhouse Company, Limited, on condition that extensions or indulgences of time would be granted—that is the sense I think of the instrument—that it would require some act on the part of the bank in order to give vitality to that instrument; otherwise it would be entirely unilateral, there would be simply an agreement upon the one side without any movement or binding force upon the

other. Especially would that be true as to the past due obligations, and I think that they were all past due excepting perhaps £117—I do not recall now—that was advanced—well, more than one; there were several of the items there. And upon the other question of payment, I am convinced in my own mind, taking the conduct of the parties as disclosed by the evidence, that the payment when it was made in February was payment. I in my own mind believe that the assignment was an after-thought. The relation of Mr. McNab, who appears to be one of the guarantors to the extent of £21,000, the same amount for which Mr. Waterhouse became a guarantor, and I think perhaps [49] in the same accounts, the three different accounts, the testimony of Mr. Anderson discloses that this was paid by Mr. Gill, and I think the testimony likewise discloses either on the part of Mr. Gill or the testimony of Mr. Anderson that this was paid upon the suggestion of Mr. McNab. Now, Mr. McNab was the attorney—Mr. McNab was a client of Mr. Gill. Mr. McEwen in his testimony on cross-examination identifies a contract between the defendant Waterhouse Company, Incorporated, of which Mr. McNab was one of the stockholders, in which this indebtedness was to be taken care of, and when we take all of these things into consideration, the motive that would prompt Mr. McNab, the testimony of the witnesses who testify with relation to the payment and the circumstances surrounding the payment as made, the disclosure of the witnesses' ignorance of the things which actually did take place, and the testimony sim-

ply directed to the things which affirmatively appear on the record, and then the absence of the testimony on the part of the bank from persons who know as to what was actually done and the intention of the parties, and then the assignation as it is called which was executed in October following, eight months after the payment was made as recorded in the books of the bank, and the testimony of Anderson, who seems to be advised and states that the bank afterwards granted the assignation, when we take all these things into consideration, I am in my own mind convinced that the payment, when it was made by Gill, was made on behalf of these other parties upon whom the obligation rested, and it was not at that time with any intention of granting an assignment, and this is further confirmed by the testimony that no assignment was made and taken from the bank of McNab and of these other parties. The only assignment that was made was [50] simply the assignment of Waterhouse.

So I think that the objections to the offers of testimony which have been reserved must be sustained and the motion to dismiss must be granted.” [51]

[Title of Court and Cause.]

**Stipulation Re Appointment of Commissioner to
Take Depositions, etc. . .**

IT IS STIPULATED by and between the parties hereto, that a commission be directed to W. H. Quarrell, Commissioner for Oaths, 3 East Indiana Avenue, London, England, to take the testimony of

William McEwen, James Robb, and William Bamford Laing, at London, England, and to Alexander Guild, Notary Public, 5 Rutland Square, Edinburgh, Scotland, to take the testimony of James Gill and James Lawson Anderson, at Edinburgh, Scotland; said testimony to be taken upon the interrogatories and cross-interrogatories on file herein, which shall be attached to said commission; that when said testimony is taken and reduced to writing, the same shall be signed by the respective witnesses, certified to by the officers taking said testimony, and returned to the clerk of this court, then to be used by either party to the above-entitled action upon the trial thereof, all objections to the making of said testimony, save to the relevancy or materiality of any question or answer or part thereof, being hereby expressly waived, but the right to object to the materiality or relevancy of any question or answer contained therein upon the trial of said action being hereby reserved.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant. [52]

[Title of Court and Cause.]

**Interrogatories to be Propounded to James Gill on
Behalf of Plaintiff.**

Interrogatory No. 1: State your name, age, residence and occupation.

Interrogatory No. 2: State whether or not you are a practitioner in the courts of Scotland.

Interrogatory No. 3: State whether or not you are learned in the law of Scotland and Great Britain.

Interrogatory No. 4: Were you acquainted with John Gill, the plaintiff in the above-entitled action, during his lifetime, and state what, if any, relationship you bore to him?

Interrogatory No. 5: Where did the said John Gill reside from the time of the commencement of this action in December, 1907, until the time of his death? [53]

Interrogatory No. 6: Of what country was the said John Gill a citizen and subject from the time of the commencement of this action until the time of his death?

Interrogatory No. 7: When and where did the said John Gill die?

Interrogatory No. 8: Have you in your possession what purports to be an assignation from The Commercial Bank of Scotland, Limited, in favor of John Gill, dated 8th of October, 1907, and purporting to be signed by N. B. Gunn and Thomas W. Tod, as directors, and Alex Bogie, manager, of The Commercial Bank of Scotland, Limited, purporting to assign to the said John Gill a letter of guarantee granted by Frank Waterhouse, together with the claim of said bank for all sums, with interest, to the extent of 21,000 pounds, due to said bank from the said Frank Waterhouse?

Interrogatory No. 9: If you have said assignation

in your possession, please attach the same to your deposition.

Interrogatory No. 10: State whether or not said assignation is properly executed under the laws of Scotland, and whether or not the same, as executed, operates under the laws of Scotland to convey to the said John Gill what the same by its terms purports to convey.

Interrogatory No. 11: What is the law of Great Britain relative to the admission in evidence of copies of entries in bankers' books? [54]

Interrogatory No. 12: Please state any other matter or thing material to the issues herein which occurs to you and concerning which you have not been interrogated by the foregoing interrogatories.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff. [55]

[Title of Court and Cause.]

Cross-interrogatories to be Propounded to James Gill, on Behalf of Defendant.

Cross-interrogatory 1:

If in answer to direct interrogatories you have stated that you were acquainted with the plaintiff John Gill during his lifetime, please state what was the business or occupation of John Gill. Also state what connection, if any, he had with the Commercial Bank of Scotland, Limited, and how long had such connection existed prior to his death.

Cross-interrogatory 2:

If in answer to direct interrogatory No. 8 you have stated that you have in your possession the document therein referred to, please state how said document came into your possession.

Cross-interrogatory 3:

Did John Gill at the time of his death, or at any other [56] time so far as you know, hold or have in his possession under assignment or transfer to him or to any other person, a letter or letters of guaranty of payment of indebtedness of Frank Waterhouse, Limited, to the Commercial Bank of Scotland, Limited, given by Alexander McNab, I. McNab, R. B. Archibald, Marshall McEwen & Company, or J. M. Mitchell, sometimes known as John M. Mitchell? If so, what became of such letters of guaranty? Did John Gill, plaintiff, have in his possession or control any other document or writing, assignation, transfer or conveyance relating to the indebtedness of Frank Waterhouse, Limited, to the Commercial Bank of Scotland, Limited, or given and executed as security for such indebtedness, other than the document referred to in direct interrogatory No. 8?

Cross-interrogatory 4:

If you have stated that you have in your possession the document referred to in direct interrogatory No. 8, state how the same came into your possession. If you answer that it came through the estate of John Gill, then state how the same came into the possession of John Gill. Did he hold the same as agent, trustee, or representative of Alex-

ander McNab or of any other person? What money or moneys did John Gill pay to the Commercial Bank of Scotland for such document? How were such payments made? If by check, note or bill, please give date and names of all parties attached to such instrument.

Cross-interrogatory 5:

Were you in any way connected with the administration of the estate of John Gill? If so, state your connection therewith fully. Were there any outstanding accounts, bills, or [57] notes, or business transactions between Alexander McNab and John Gill as shown by the papers in the estate of John Gill, or in his possession or control at the time of his death, relating directly or indirectly to the business of Frank Waterhouse, Limited, with the Commercial Bank of Scotland, or to the letter of guaranty of defendant Frank Waterhouse. If so, explain the same fully and in detail. Did Alexander McNab pay, either to John Gill or the Commercial Bank of Scotland, Limited, any part of the sum or sums which may have been paid by John Gill to said bank for said instrument referred to in direct interrogatory No. 8? Was there any agreement, written or verbal, between John Gill and Alexander McNab, or with any other person, whereby said McNab was entitled to or obligated to repay to John Gill any moneys advanced or paid by John Gill to the Commercial Bank of Scotland, Limited, on this transaction, or under which Alexander McNab was or is entitled to share in the proceeds of

this suit, or of any collection made from said letter of guaranty of said Frank Waterhouse, defendant, or to repay to or indemnify John Gill against any losses he might sustain by reason of any moneys he paid or advanced to the Commercial Bank of Scotland, Limited, on said letter of guaranty, or in the purchase thereof?

Cross-Interrogatory 6:

If you have stated that John Gill was a solicitor or attorney at law, please state whether he was the legal adviser of Alexander McNab at any time between the year 1900 and the time of his death.

HAROLD PRESTON and
BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant. [58]

[Title of Court and Cause.]

**Interrogatories to be Propounded to James Lawson
Anderson, George Street, Edinburgh, Scotland,
on Behalf of Plaintiff.**

Interrogatory No. 1: State you name, age, residence and occupation.

Interrogatory No. 2: Are you acquainted with the Commercial Bank of Scotland, Limited?

Interrogatory No. 3: Have you any official connection with said Commercial Bank of Scotland, Limited, and if so, state for how long.

Interrogatory No. 4. If said Commercial Bank of Scotland, Limited, is a corporation, state when and where and under what law it was organized as a corporation.

Interrogatory No. 5. What is the character of the business of said Commercial Bank of Scotland, Limited?

Interrogatory No. 6: What is the principal place of business of said Commercial Bank of Scotland, Limited? [59]

Interrogatory No. 7: Attach to your deposition a copy of the charter or articles of incorporation of said Commercial Bank of Scotland, Limited, certified to be a true copy thereof by the officer who, under the laws of Scotland, has lawful custody thereof, with the seal of his office annexed, if such officer have a seal.

Interrogatory No. 8: What is and was the citizenship and residence of a majority of the stockholders of the Commercial Bank of Scotland, Limited, upon January 1, 1897, and from then continuously on?

Interrogatory No. 9: Are you acquainted with an account or accounts of the Commercial Bank of Scotland, Limited, against Frank Waterhouse, Limited?

Interrogatory No. 10: State what, if any, disposition said Commercial Bank of Scotland, Limited, has made of said claim on account of said indebtedness and of the letter of guarantee of the said Frank Waterhouse described in the complaint herein.

Interrogatory No. 11: Your attention is called to what purports to be a written assignation of said claim and said letter of guarantee which is in the possession of James Gill, which said assignation purports to assign to said John Gill said letter of guarantee granted by Frank Waterhouse, together

with the claim of said Commercial Bank of Scotland, Limited, against said Frank Waterhouse under said letter of guarantee, which said assignation bears date October 8, 1907, and purports to be signed by N. B. Gunn and Thomas W. Tod, [60] directors, and Alex Bogie, manager, of said Commercial Bank of Scotland, Limited. Please observe the signatures attached to said assignation and state whether or not you recognize and can identify each of said signatures to said instrument as being the true signatures of the individuals they purport to be.

Interrogatory No. 12. State whether or not at the time said assignation purports to have been executed, the said N. B. Gunn and Thomas W. Tod were duly qualified and acting directors, and the said Alex Bogie was the duly qualified and acting manager, of the Commercial Bank of Scotland, Limited.

Interrogatory No. 13: State whether or not at said time the said N. B. Gunn and Thomas W. Tod, as directors, and the said Alex Bogie, as manager, were duly authorized to execute said assignation on behalf of said Commercial Bank of Scotland, Limited.

Interrogatory No. 14: State whether or not a letter was written by you for the Commercial Bank of Scotland, Limited, to Frank Waterhouse, relative to the account or accounts of Frank Waterhouse, Limited, on or about October 31, 1906.

Interrogatory No. 15: If you answer "yea" to the foregoing interrogatory, please attach a copy of said letter to your deposition.

Interrogatory No. 16: Please state any other matter or thing material to the issues herein which occurs to you and concerning which you have not been interrogated by the foregoing interrogatories.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff. [61]

[Title of Court and Cause.]

**Cross-Interrogatories to be Propounded to James
Lawson Anderson, on Behalf of Defendant.**

1. Cross-Interrogatory No. 1:

If in answer to direct interrogatories, you have stated the citizenship and residence of a majority of the stockholders of the Commercial Bank of Scotland, Ltd., on January 1, 1907, to the present date, please state whether Alexander McNab was during said period, or any part thereof, a stockholder in said bank, and if so, what amount of stock he held.

2. Cross-Interrogatory No. 2:

If in answer to direct interrogatory No. 10, you have stated that the bank made any disposition of the indebtedness and letter of guaranty therein mentioned, state whether such disposition was made by written instruments. Did the bank hold any letter or letters of guaranty of this indebtedness, or any part thereof, from Alexander McNab, I. McNab, R. B. Archibald, Marshall, McEwen & Co. or John M. Mitchell? [62] If so state fully and in detail what disposition was made of said letters of guaranty. If any of them have been assigned or trans-

ferred by the bank, state to whom, and when they were so transferred, and for what consideration. If any of them have been released by the bank, state when and for what consideration. If any of said guarantors have died since the execution of such guaranties, state which of them are dead and when they died, and also state whether the bank made or filed any claim against their estates on account of such letter or letters of guaranty. If not, why not? If no such claim was made or filed, were such estates released from liability to the bank?

3. Cross-Interrogatory No. 3:

If you have stated in answer to direct interrogatory No. 10 that the letter of guaranty of Frank Waterhouse, defendant, was assigned to plaintiff, John Gill, please state at whose instance and request such assignment was made. Who first made the suggestion to the bank that said letter of guaranty should be so assigned or transferred? Was Alexander McNab a party to such negotiations or present in person or by representative at any time in connection therewith?

4. Cross-Interrogatory No. 4:

If you have stated that the bank assigned the letter of guaranty of the defendant, Frank Waterhouse, to John Gill, state what consideration was paid to the bank by John Gill therefor. Was such consideration paid in cash, or by check or checks, bill or bills, note or notes? If by check, bill or note, give the dates thereof, and the names of all parties appearing thereon. [63]

5. Cross-Interrogatory No. 5:

Did you personally participate in the negotiations leading up to the execution of this assignment to the plaintiff, John Gill? If so, state whether there was any understanding, agreement or contract written or verbal between the defendant, John Gill and Alexander McNab, or between the bank and McNab, or between Gill and McNab, to the effect or in substance that Gill was acting for or in the interest of Alexander McNab in taking an assignment of this letter of guaranty of the defendant, or under or by which McNab was to repay to said John Gill any moneys advanced by Gill on account thereof, or by which McNab was to receive the benefit, directly or indirectly, of any collections that might be made from the defendant Waterhouse thereon. If any such understanding, agreement or contract existed, please state the same fully according to your best knowledge and recollection.

6. Cross-Interrogatory No. 6:

Did Alexander McNab either before, at the time of, or subsequent to the execution of said assignment by the bank to John Gill of the letter of guaranty of defendant Waterhouse, pay either to the bank or to Gill any part of the consideration received by the bank for such assignment, or give any note or bill therefor? If you state that there was no such understanding, agreement or contract between the bank or McNab and Gill, please explain what interest Gill had in the purchase of the letter of guaranty of the defendant Waterhouse, and why he did not at the same time purchase or acquire the

other letters of guaranty executed to the bank to secure the payment of the indebtedness of Frank Waterhouse, Ltd. [64]

7. Cross-Interrogatory No. 7;

If you have stated in answer to the previous cross-interrogatories that the bank has not disposed of or released the letters of guaranty of Alexander McNab, I. McNab, R. B. Archibald, Marshall, McEwen & Company and J. M. or John M. Mitchell for payment of the indebtedness of Frank Waterhouse, Ltd., please state whether the bank still holds said letters of guaranty to secure said indebtedness.

8. Cross-Interrogatory No. 8:

Was the Commercial Bank of Scotland, Ltd., notified of the execution of a memorandum of agreement between the defendant, Frank Waterhouse, and Frank Waterhouse, Ltd., by and through J. M. Mitchell and William McEwen, on or about October 6, 1900? Did the bank receive from Frank Waterhouse, Ltd., or from any of its officers or directors, the bonds executed by Frank Waterhouse & Company, pursuant to the terms of said memorandum agreement? Did the bank make any advances to Frank Waterhouse, Ltd., after the date of said agreement of October, 1900? Did not the bank know that Frank Waterhouse, Ltd., had ceased active business on or about that date?

9. Cross-Interrogatory No. 9:

If in answer to direct interrogatory No. 14, you state that a letter was written by you for the Commercial Bank of Scotland, Ltd., to the defendant, Frank Waterhouse, relative to the account of Frank

Waterhouse, Ltd., on or about October 31, 1906, state whether or not any requests or demands were made by the bank on Frank Waterhouse, Ltd., or on any of its officers or directors, for payment of the indebtedness of Frank Waterhouse, Ltd., between the opening of said account [65] in the year 1898, and the writing of said letter of October 31, 1906. If you have stated that you wrote a letter on the date referred to, to the defendant, Frank Waterhouse, state whether at that or any other time, the bank made a demand upon any of the other guarantors of the indebtedness of Frank Waterhouse, Ltd., for payment thereof. If so, state when and upon whom such demand was made. If you say that no such demand was made, please explain why the bank made a demand upon the defendant Waterhouse, under his letter of guaranty, and did not make a similar demand upon the other guarantors of the indebtedness. Also please state at whose instance and request the letter of October 31, 1906, was written by you. Was Alexander McNab a customer of the bank between the years 1898 and 1906? Was he not reputed to be a man of large wealth and a large property owner? Where did he reside, in what business was he engaged? Were all of the guarantors of the indebtedness to Frank Waterhouse, Ltd., except the defendant Waterhouse, residents of and engaged in business in England or Scotland?

HAROLD PRESTON and

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Defendant. [66]

[Title of Court and Cause.]

**Interrogatories to be Propounded to William
McEwen, Electra House, Finsbury Pavement,
London, England, on Behalf of Plaintiff.**

Interrogatory No. 1: State your name, age, residence and occupation.

Interrogatory No. 2: Are you acquainted with a corporation named Frank Waterhouse, Limited, and if so, please state what, if any, official connection you have or have had with such corporation.

Interrogatory No. 3: Please attach to your deposition a copy of the charter or articles of incorporation of said Frank Waterhouse, Limited, certified to be a true copy thereof by the officer who, under the laws of Scotland or Great Britain, has lawful custody thereof, with the seal of his office annexed, if such officer have a seal.

Interrogatory No. 4: Between the 18th day of March, 1898, and the 31st day of October, 1903, who were the directors and who the secretary of Frank Waterhouse, Limited? [67]

Interrogatory No. 5: Please examine a copy of the account or accounts of Frank Waterhouse, Limited, with The Commercial Bank of Scotland, Limited, which is attached to the deposition of James Robb, and state whether or not said account correctly sets forth amounts advanced to said Frank Waterhouse, Limited.

Interrogatory No. 6: State whether or not said copy of account or accounts correctly shows the manner and the amounts in which said account or

accounts of Frank Waterhouse, Limited, were operated upon by cheques, drafts, bills, promissory notes or other obligations.

Interrogatory No. 7: State whether or not the amounts shown by said copy of account or accounts to have been paid out for the benefit of said Frank Waterhouse, Limited, were actually so paid.

Interrogatory No. 8: If you have in your possession, or if there is in the possession of Frank Waterhouse, Limited, any cheques, drafts, bills, promissory notes or other obligations which operated on said account or accounts of Frank Waterhouse, Limited, please attach the originals thereof to your deposition.

Interrogatory No. 9: At whose instance and request were advances shown by the copy of said account or accounts to have been made to Frank Waterhouse, Limited, made?

Interrogatory No. 10. Please state in detail what, if any, demand or demands have been made for the payment of the [68] indebtedness shown by said copy of account or accounts.

Interrogatory No. 11: Please state in detail what, if any, payments have been made on said account or accounts since October 31, 1903.

Interrogatory No. 12. Please state any other matter or thing material to the issues herein which occurs to you and concerning which you have not been interrogated by the foregoing interrogatories.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff. [69]

[Title of Court and Cause.]

**Cross-interrogatories to be Propounded to William
McEwen on Behalf of the Defendant.**

Cross-Interrogatory 1:

When was the corporation of Frank Waterhouse, Limited, organized? Who were its original incorporators and shareholders? State what changes were made in the shareholders between the time of the organization of the company and January 1, 1903.

Cross-Interrogatory 2:

In what business was the company engaged? Where was its business conducted?

Cross-Interrogatory 3:

When did you become secretary of the company? What relation, if any, did you have to the company prior to the time you became its secretary? Did you have any business connection or relations with Alexander McNab at the time you became [70] secretary of this company? If so, what were such connections or relations? What business relations have you had with him since this company went out of business?

Cross-Interrogatory 4:

When did Frank Waterhouse, Limited, discontinue active business operations?

Cross-Interrogatory 5:

Are you the William McEwen who on October 6, 1900, in connection with one John M. Mitchell, executed on behalf of the company the memorandum of agreement, copy of which is attached hereto

marked Exhibit "A"? By whom were you authorized to enter into said memorandum of agreement on behalf of the company?

Cross-Interrogatory 6:

Did said Frank Waterhouse, Limited, withdraw from, and cease to do and carry on any active business operations immediately after the sale and transfer of its property and assets as stipulated in this memorandum of agreement?

Cross-Interrogatory 7:

What was the indebtedness of Frank Waterhouse, Limited, to the Commercial Bank of Scotland, Limited, on October 6, 1900?

Cross-Interrogatory 8:

Was the Commercial Bank of Scotland, Limited, notified by you or by any of the other directors of Frank Waterhouse, Limited, so far as you know, of the terms of this memorandum [71] of agreement executed by you and Mr. Mitchell on behalf of the company? Was Mr. Alexander McNab informed of the contents of this agreement by you or Mr. Mitchell? If so, when? Were the terms of this agreement submitted by you to Mr. McNab by cable or otherwise prior to or at about the time of its execution?

Cross-Interrogatory 9:

If you state in answer to the last cross-interrogatory that the Commercial Bank of Scotland, Limited, was not notified of the memorandum of agreement above mentioned, please state whether this information was withheld from the bank purposely

or by inadvertence. If withheld purposely, please explain why.

Cross-Interrogatory 10:

How many separate accounts did Frank Waterhouse, Limited, carry with the Commercial Bank of Scotland, Limited? Was there one account called the "Loan Account" for 15,000 pounds, and another account called "No. 2 Account" for 5,000 pounds, and a general account?

Cross-Interrogatory 11:

Was not the loan account for 15,000 pounds secured by separate guaranties in the same form executed severally by A. McNab, I. McNab, R. B. Archibald, Marshall McEwen & Company, Frank Waterhouse and J. M. Mitchell?

Cross-Interrogatory 12:

Was not No. 2 Account for 5,000 pounds secured by separate guaranties executed severally by A. McNab, I. McNab, [72] R. B. Archibald and Frank Waterhouse?

Cross-Interrogatory 13:

Was not the general account secured by separate guaranties executed severally by A. McNab and J. M. Mitchell?

Cross-Interrogatory 14:

If in answer to direct interrogatory No. 9 you have stated at whose instance and request the advances shown by the account or accounts were made to Frank Waterhouse, Limited, please state which of said advances, if any, were made subsequent to the execution of the memorandum of agreement above mentioned, to wit, October 6, 1900, and at whose re-

quest such advances were made.

Cross-Interrogatory 15:

What has become of the several guaranties of the Indebtedness of Frank Waterhouse, Limited, given to the bank by A. McNab, I. McNab, R. B. Archibald, J. M. Mitchell and Marshall McEwen & Company? If any of these guarantors have been released from their guaranty, state which of them have been so released, and when they were so released. If any of these guaranties have been assigned or transferred by the bank, to your knowledge, state which of them have been so assigned or transferred, when and to whom.

HAROLD PRESTON and

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Defendant. [73]

[Title of Court and Cause.]

Interrogatories to be Propounded to William Bamford Laing, of Glasgow, Scotland, on Behalf of Plaintiff.

Interrogatory No. 1: State your name, age, residence and occupation.

Interrogatory No. 2: Are you acquainted with the Commercial Bank of Scotland, Limited?

Interrogatory No. 3: Have you, or have you had in the past, any connection with the Commercial Bank of Scotland, Limited, either at Glasgow or London, and if so, state what, if any, official position you held or have held.

Interrogatory No. 4: Are you acquainted with

an account or accounts of Frank Waterhouse, Limited, standing upon the books of the Commercial Bank of Scotland, Limited?

Interrogatory No. 5. By whom were said account or accounts kept? [74]

Interrogatory No. 6: If you answer that said account or accounts were kept by yourself or under your direction, please state whether or not said account or accounts were kept upon the regular books of The Commercial Bank of Scotland, Limited, and whether or not the entries appearing in said account or accounts were made in the regular course of business of said bank.

Interrogatory No. 7: Please examine the copy of said account attached to the deposition of James Robb and state whether or not the same is a full, true and correct copy of the account or accounts of Frank Waterhouse, Limited, kept by you or under your direction in the regular course of business of said bank.

Interrogatory No. 8: Between the 18th day of March, 1898, and the 31st day of October, 1903, what, if any, amounts were advanced by the Commercial Bank of Scotland, Limited, to Frank Waterhouse, Limited?

Interrogatory No. 9: In what way were these amounts advanced?

Interrogatory No. 10: If you answer that amounts were deposited to the account or accounts of Frank Waterhouse, Limited, state whether or not the dates and amounts such deposits were made are correctly shown upon the transcript of account at-

tached to the deposition of the said James Robb.

Interrogatory No. 11: If you state that amounts were deposited to the account or accounts of Frank Waterhouse, [75] Limited, state how these accounts were operated on for Frank Waterhouse, Limited, whether by cheques or drafts or bills or promissory notes or otherwise.

Interrogatory No. 12: If you answer said account or accounts were operated on by cheques or drafts or bills or promissory notes or otherwise, by whom were said obligations signed?

Interrogatory No. 13: If you answer said account or accounts were operated on by cheques or drafts or bills or promissory notes or other obligations, what has become of the originals of said cheques or drafts or bills or promissory notes or other obligations?

Interrogatory No. 14: If you have in your possession the originals of any of said cheques, drafts, bills, promissory notes or other obligations which operated on the account or accounts of Frank Waterhouse, Limited, advanced by the Commercial Bank of Scotland, Limited, attach such originals to your deposition.

Interrogatory No. 15: State whether or not the payments shown by said account or accounts were actually made on cheques, drafts, bills, promissory notes or other obligations as shown by said account or accounts.

Interrogatory No. 16: State at whose request the advances made to the account or accounts of Frank Waterhouse, Limited, by the Commercial Bank of

Scotland, Limited, as aforesaid, were made. [76]

Interrogatory No. 17: State whether or not at periods between May 7, 1898, and October 31, 1903, statements showing interest upon said account or accounts of Frank Waterhouse, Limited, were rendered the said Frank Waterhouse, Limited, or the said Frank Waterhouse, and if so, when.

Interrogatory No. 18: If you answer that said statements were rendered, state where the originals thereof are, if you know.

Interrogatory No. 19: State whether or not such statements were assented to as rendered.

Interrogatory No. 20: Please state any other matter or thing material to the issues herein which occurs to you and concerning which you have not been interrogated by the foregoing interrogatories:

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff. [77]

[Title of Court and Cause.]

Cross-interrogatories to be Propounded to William Bamford Laing, on Behalf of Defendant.

Cross-Interrogatory 1:

If you have stated in answer to direct interrogatory No. 3 that you have any official connection with the Commercial Bank of Scotland, Limited, please state what that connection is and what your connection has been with the bank since March 18, 1898.

Cross-Interrogatory 2:

If you have stated in answer to direct interrogatories that any amount or amounts were advanced by

the bank to Frank Waterhouse, Limited, are your statements in that respect based upon personal knowledge of such advances, or merely upon entries you find upon the books of the bank?

Cross-Interrogatory 3.

Was Alexander McNab a customer of the bank at the time the account with Frank Waterhouse, Limited, was opened by the bank? Has he been a customer of the bank from that date to [78] the present? If not, when did he cease to be such customer?

Cross-Interrogatory 4.

If you have stated that Alexander McNab was a customer of the bank, please state whether or not the advances made Frank Waterhouse, Limited, were primarily made upon the credit of Alexander McNab? What security in the form of guaranties, pledges or otherwise, were taken by the bank at the time of the opening of the account with Frank Waterhouse, Limited, or at any subsequent date, to secure the payment of advances made Frank Waterhouse, Limited? Please state fully and in detail.

Cross-Interrogatory 5.

Were the advances made by the bank to Frank Waterhouse, Limited, made under one general account or under separate and distinct accounts? If under separate and distinct accounts, please state whether one of these accounts was known as the "Loan Account" for 15,000 pounds, and another known as "account No. 2" for 5,000 pounds, and the other known as a "General Account"?

Cross-Interrogatory 6.

Did the bank receive from Alexander McNab any

security or guaranty of payment of the indebtedness of Frank Waterhouse, Limited, and did it also receive any security or guaranty of payment of said indebtedness from I. McNab, R. B. Archibald, Marshall McEwen & Company, and J. M. Mitchell, or either of them? If you answer that such security or guaranties were received by the bank, please state fully what securities or guaranties were received for the indebtedness shown by each of said accounts, when such security or guaranties [79] were received by the bank.

Cross-Interrogatory 7.

If you have stated that securities or guaranties were given to the bank for the indebtedness of Frank Waterhouse, Limited, by Alexander McNab, I. McNab, R. B. Archibald, Marshall McEwen & Company, and J. M. Mitchell, or either of them, please state the residence of each of the persons so giving such security or guaranties, the business or occupation of each of such persons and their place of business.

Cross-Interrogatory 8.

If you have stated that R. B. Archibald gave such security or guaranty to the bank, please state whether he is now living or dead? If dead, when did he die, and where was his estate located? Did the bank make or file any claim against his estate on such guaranty or guaranties? If not, please explain why such claim was not made or filed against the estate? If he or his estate was at any time released by the bank, please explain fully when it was so released, and why?

Cross-Interrogatory 9.

If you have stated that I. McNab gave any security or guaranty to the bank for the indebtedness of Frank Waterhouse, Limited, or any part of it, please state whether he is living or dead. If dead, state when he died and where his estate was located and administered. Was he or his estate released from such security or guaranty by any action of the bank or by failure to file claim against his estate? If so, explain fully why he was so released. [80]

Cross-Interrogatory 10.

If you have stated that J. M. Mitchell gave any security or guaranty to the bank for the indebtedness of Frank Waterhouse, Limited, please state whether he has been released from such guaranty or guaranties, and if so, why.

Cross-Interrogatory 11.

If you have stated that Alexander McNab and Marshall McEwen & Company, either or both, gave any security or guaranties to the bank for the indebtedness of Frank Waterhouse, Limited, state whether either of them were or have been released therefrom. If so, how and why. Please state in what business Marshall McEwen & Company are engaged and where. Please state in what business Alexander McNab is engaged and where. Is he not reputed to be a man of great wealth and large property?

Cross-Interrogatory 12.

If you have stated that you had any connection with the bank during the year 1900, please state whether the bank was in any way informed of the execution of a memorandum of agreement between the defendant Frank Waterhouse, of the one part,

and Frank Waterhouse, Limited, acting by William McEwen and John M. Mitchell, of the other part, dated October, 1900, and a copy of which is attached to the interrogatories herein addressed to William McEwen. Was the bank notified that pursuant to this agreement, Frank Waterhouse, Limited, conveyed its property to Frank Waterhouse & Company, a corporation organized by the defendant pursuant to said agreement? Did the bank at any time receive the bonds issued by Frank Waterhouse & Company, pursuant to such agreement? [81]

Cross-Interrogatory 13.

Were any advances made by the bank to Frank Waterhouse, Limited, subsequent to this agreement of October, 1900? If so, at whose instance and request?

Cross-Interrogatory 14.

If in answer to direct interrogatory 20 you have stated that the bank assigned and transferred its claim against the defendant Frank Waterhouse under his letter of guaranty, please state whether this was done at the instance of Alexander McNab. Please state what money was received by the bank for such assignment, from whom it was received and in what form, whether in cash, by check, notes or bills. If by checks, notes or bills, describe fully, giving all names appearing thereon. Please attach to your deposition an exact copy of all entries upon any of the books of the bank relating to this transfer and assignment, or to the payment made therefor, including any entries incident thereto appearing upon the ledger, cash books, day books, bills receiv-

able books, and upon any account or accounts of Alexander McNab, and upon any other books of the bank.

Cross-Interrogatory 15.

If in answer to direct interrogatory 20, you have stated that the bank transferred a letter of guaranty of defendant Frank Waterhouse to the plaintiff John Gill, state what disposition was made by the bank of the letters of guaranty of Alexander McNab, I. McNab, R. B. Archibald, Marshall McEwen & Company, and J. M. Mitchell, and each of them. If these letters of guaranty were also transferred and assigned by the bank, state to whom they were so transferred and assigned, [82] when and for what consideration, and at whose instance and request. If you state that these letters of guaranty were not transferred or assigned by the bank, state what disposition was made of them by the bank.

Cross-Interrogatory 16.

What relation, if any, did the plaintiff, John Gill, bear to the Commercial Bank of Scotland, Limited, from the year 1898 to the time of his death?

HAROLD PRESTON,

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Deft. [83]

**Exhibit "A"—Warrant for the Charter of the
Commercial Bank of Scotland.**

OUR SOVEREIGN LORD, considering that a humble Petition has been presented to His Majesty by and on behalf of the Right Honourable John Lord Rollo; Donald M'Leod, Esquire of Geanies;

Lieutenant-Colonel Charles Macquarie, residing at Ulva, in the county of Argyle; Robert Stodart, Esquire, Queen Street, Edinburgh; Colonel David Kinniard, of the Honourable East India Company's Service; James Erskine, Esquire of Aberdona; James Home, Esquire, Professor of the Practice of Physic in the University of Edinburgh; Colonel John Reid of Frankville, in the county of Ayr; John Borthwick Gilchrist, Esquire, of London; Henry Dunlop, Esquire, Merchant, Glasgow; Alexander Gordon, Esquire of Bishopsteignton; William Murray, Esquire of Westfield; Doctor Patrick Baron Seton of Preston; John Cheape, Esquire of Girgenti; Sir James Robert Grant, Knight; Charles Husband, Esquire of Glenearn,—Extraordinary Directors of the Commercial Banking Company of Scotland; Forrest Alexander, Esquire, Merchant in Edinburgh; John Anderson of Gladswood; David George Sandeman, Esquire of Springland; Robert Scott, Esquire, Druggist in Edinburgh; James Wyld, Esquire of Gileton; William Macdonald, Esquire of Powderhall; Alexander Munro, Esquire, residing Princes Street, Edinburgh; John Bradfute, Esquire, Bookseller in Edinburgh; Walter Brown, Esquire, Merchant in Edinburgh; Henry Vansittart White, Esquire, Princes Street, Edinburgh; William Henderson, Esquire, Merchant in Edinburgh; Archibald Anderson, Esquire, Bruntefield Place, Edinburgh; William Laing, Esquire, Bookseller in Edinburgh, William Ellis, Esquire, Solicitor before the Supreme [84] Courts of Scotland, Edinburgh; and Alexander Clapperton, Esquire, Merchant in Edinburgh,—Ordinary direc-

tors of the said company; and Alexander Macartney, Esquire, Manager for the said company: Which Petition represents, That the Petitioners, and many other persons residing in that part of His Majesty's dominions called Scotland, had formed themselves into a Society or Partnership, and established the same in the said city of Edinburgh, under the name of the Commercial Banking Company of Scotland, for carrying on the business of Banking in all its branches, had subscribed and raised amongst themselves a large capital, in transferable shares: That the public had greatly benefited by the formation of their Society, and that a considerable revenue was derived to His Majesty therefrom: That it would greatly tend to the benefit and good management of the concerns of the said Company, established by the Petitioners and others as above written, if His Majesty would be graciously pleased to grant to the said Company a Royal Charter of Incorporation; and therefore, the Petitioners humbly prayed, that His Majesty would be graciously pleased to grant to the said Company a Royal Charter, for incorporating them, and such persons as might be thereafter duly admitted Members of the said Society, into one Body Corporate and Politic, by the name and style of the Commercial Bank of Scotland, with a perpetual endurance and succession, and with power to hold heritable property, and such other powers and privileges as are usually granted to other Bodies Corporate and Politic of the same nature, and in such manner as to His Majesty in his royal wisdom should seem proper. And His Majesty having taken the said Petition into his Royal consideration, and being

willing to give all proper encouragement to an establishment [85] calculated to be beneficial to the Public, and which had carried on business, with advantage to the country, since the year 1810: THEREFORE, and in compliance with the humble Petition above mentioned, and having regard to the circumstances already mentioned, particularly that the said Company has existed and carried on business for so many years, and was the first which, after the lapse of upwards of half a century, had been established on the principles of a Joint Stock Society, extending over the whole of Scotland,—during which period the agriculture, manufactures, and commerce of the country had greatly improved and increased, and a new institution of the kind became thereby useful and necessary: And farther, that the said Company had rendered useful service to the country and government, in receiving and remitting the Public Revenue: His Majesty, by virtue of his Prerogative Royal, and of his special grace, certain knowledge, and mere motion, Ordains a Charter to be made out, and passed under the Seal appointed by the Treaty of Union to be kept and used in Scotland, in place of the Great Seal thereof formerly used there,—Constituting, Erecting, and Incorporating, as His Majesty, for himself and his Royal Successors, hereby CONSTITUTES, ERECTS, AND INCORPORATES the said Petitioners, and such other person or persons as are now or shall hereafter become Members of the Society or Company, into one Body Politic and Corporate, by the name and style of THE COMMERCIAL BANK OF SCOTLAND, for the purpose of carrying on the business of Banking, in all

its branches: And, as such, and by such name, and for such purposes only, to have perpetual endurance and succession; with powers to the said Society and Corporation, under the name and style aforesaid, to take, hold, and enjoy such lands, tenements, or other heritages, as may be necessary [86] or useful in carrying on their said Trade or Business; and, if necessary, to sell, dispose, and convey the same; and to lend Money upon heritable and personal Securities; and to hold goods, effects, and chattels, for the uses and purposes of the said Society and Corporation, as hereby defined: Declaring, that all Charters, Dispositions, heritable Securities, and other Deeds or Instruments affecting heritable or personal Property, to be granted to the said Society and Corporation, shall and may be taken to them, under the fore-said Corporate name of The Commercial Bank of Scotland; and that any Charters, Dispositions, or other Deeds or Instruments to be granted by the said Society and Corporation, shall be subscribed by two or more of the Ordinary Directors, and by the Manager or Secretary for the time being, and to which the common Seal which the said Society or Corporation is authorized to use, as after mentioned, may be appended: And it is hereby declared, that all such Deeds or Instruments shall be equally valid and sufficient, as if the same had been subscribed by the whole Directors and Partners of the said Society or Corporation: And with power to the said Society or Corporation to sue and be sued, defend and be defended, plead and be impleaded, in whatever Courts and places, and before whatever Judges, Justices, or other Officers, in all actions, pleas, suits, complaints, matters and

things whatsoever, in such manner and form as any of His Majesty's subjects, or any other Body Corporate or Politic, may or can be; and to sue out and execute all manner of Diligence, real and personal, by the foresaid Corporate name of The Commercial Bank of Scotland, or in the name of the Manager for the time being: Declaring that a summons or citation in actions against the said Society or Corporation, given to their said Manager [87] or Secretary at the Society's Head Office, or other usual place of business in Edinburgh, shall be sufficient to oblige the said Society or Corporation to answer to any suit or process; and that all actions at the suit or instance of the said Society or Corporation may be brought and maintained in their said Corporate name, or in the name of the Manager for the time being; and with power to the said Society or Corporation to have and use a common Seal, and to change the same from time to time, as to the said Society or Corporation may seem expedient. And further, His Majesty doth hereby Ordain and Declare, that the Capital Stock of the said Corporation or Company of The Commercial Bank of Scotland is, and shall be, Three Millions Sterling, and to be held and disposed of in the manner mentioned in the Deed of Partnership of the said Company, bearing date the 31st day of October 1810, and several subsequent dates; the whole, or any part of which Capital Stock in addition to £600,000 already paid up, it shall and may be lawful for the Directors of the said Company for the time being, to call up and require payment of, pursuant to the said Deed of Partnership, at such time or

times, from time to time, and to such amount, as the said Directors for the time being shall order and direct in that behalf, pursuant to any Bye-Law which may be made in the manner herein directed. And His Majesty doth further Ordain and Declare, that the said Directors for the time being shall have power, and they are hereby empowered, to use and employ the Funds of the said Corporation, not only in the ordinary business of Banking, but also in purchasing or acquiring any of the Government Stocks or Securities, transferable at the Bank of England or Bank of Ireland, Exchequer Bills, or other Government Securities, of whatever nature the same may be; [88] any part of the Stock of the Bank of England or Bank of Ireland, or of any Incorporated Company, or any Bills of Exchange, Bullion, Gold, or Silver, and every other kind of personal Property, that may be acquired or purchased for behoof of the Proprietors of the said Commercial Bank of Scotland; and to sell, dispose of, or transfer all such government Stocks, and other securities or properties, as the said Commercial Bank of Scotland may acquire or be possessed of, in as full and ample manner as any Body Politic or Corporate, or any Company or individual whatever, in any part of His Majesty's dominions, may or can do. And His Majesty hereby Grants and Declares, that the present Extraordinary and Ordinary Directors of the said Society, as a Company, shall continue in office, and act as such respectively, until the Seventeenth day of December eighteen hundred and thirty-one years; upon which day, at Two o'clock in the

afternoon, there shall be held, in the Society's Head Office, in Edinburgh, a General Meeting of the Partners of Members of the said Society or Corporation; at which Meeting, and at the Meetings to be held annually upon the 17th day of December, if a lawful day, or the first lawful day thereafter, the Society or Corporation shall elect Extraordinary and Ordinary Directors, according to the Rules and Regulations now observed by the said Society, or according to any other Rules or Regulations which they may hereafter make by any Bye-Law in that behalf; And they shall also, at the said first Meeting or at any future Meeting, elect a Governor and Deputy-Governor, and shall do the same annually thereafter, upon the said 17th day of December, if a lawful day, or on the first lawful day following; which several Governors or Directors shall hold their offices respectively, and shall have full power to [89] manage, direct, order and appoint, in all matters and things touching and respecting the said Society, in terms of, and conform to, the Bye-Laws and Regulations of the said Society, in that behalf made, and now in observance, or hereafter to be made and provided. And further, His Majesty gives and grants to the said Society or Corporation, power and authority at their said annual General Meeting, or at any other General Meeting of the Members or Partners, called upon at least Thirty Days previous intimation, in the Edinburgh Evening Courant, Caledonian Mercury, and Edinburgh Advertiser; and in case of the discontinuance of these Newspapers, or any of them, by intimation in any

other three Newspapers, to be fixed by the Ordinary Directors for the time being,—to alter or annul any Bye-Laws, Rules, and Regulations of the said Society in observance, and to make and frame such other Bye-Laws, Rules, and Regulations, as the said Society of Corporation, or the major part of its Members assembled for the time, shall judge proper and necessary, for the better government and direction of the said Society or Corporation,—the votes of the said Members assembled at the said Meeting being taken in the manner provided by the Laws and Rules then in observance; and afterwards to alter or annul such Bye-Laws, Rules, and Regulations, from time to time, as the said Society or Corporation, or the major part of its Members assembled for the time, shall think fit and necessary,—but so always as the said Bye-Laws, Rules, and Regulations be no wise contrary to the Laws of the realm. And His Majesty further grants and confirms to the said Company or Corporation, all the Goods, sums of Money, Property, heritable and movable, real and personal, Rights, Profits, Benefits, Securities, Powers, Privileges, and others whatsoever, heretofore acquired and possessed, [90] enjoyed and exercised by the said Corporation, to be possessed, enjoyed, and exercised by them in all time coming, in manner at more length above specified: But declaring hereby, that nothing contained in these presents shall be construed as intended to limit the responsibility and liability of the individual Partners of the said Corporation for the debts and engagements lawfully contracted, or to be contracted, by the said Corporation,

—which responsibility and liability is to remain as valid and effectual, as if these presents had not been granted, any law or practice to the contrary notwithstanding: Providing and declaring always, that the said Society or Corporation shall be duly authorized, in virtue of the Charter to follow hereon, to carry on the business of Banking, in all its branches, and shall not be empowered, in virtue thereof, to carry on any other trade or business whatever; And further, providing and declaring that the said Company or Corporation shall render annually to the Lords Commissioners of His Majesty's Treasury, an account, certified by the Cashier, Secretary, or Accountant of the said Company, shewing the weekly amount of their Notes in circulation, of each denomination. And His Majesty further grants, by these presents, for himself, his heirs and successors, that the Charter to follow hereon, shall be in and by all things valid and effectual in law, according to the true intent and meaning of the same, and shall be held, and construed, and adjudged, in the most favourable and beneficial sense, for the best advantage of the said Corporation, notwithstanding any misrecital, defect, uncertainty, or imperfection therein contained. And His Majesty doth hereby, for himself, his heirs and successors, covenant, grant, and agree to and with the said Corporation or Body Politic, and their [91] successors, That he, his heirs and successors, shall and will from time to time, and at all times hereafter, upon the humble suit and request of the said Corporation or Body Politic, and their successors, give and grant unto them all such further and other privileges, au-

thorities, matters, and things, for rendering more effectual this his grant, according to the true intent and meaning of these presents, which he or they can or may lawfully grant, and as shall be reasonably advised and devised by the Council, learned in the law, of the said Corporation or Body Politic for the time being, and shall be approved of by the Lord Advocate or Solicitor-General for Scotland of His Majesty, his heir and successors, on his and their behalf. And His Majesty doth further will and command, that this Charter do pass the Seal appointed by the Treaty of Union to be kept and used in Scotland, in place of the Great Seal thereof formerly used there, without passing any other seal or register. For the doing whereof, as well to the Director of His Majesty's Chancery for writing the same, as to the Lord Keeper of the Seal, for causing the said Seal to be appended thereto, this shall be a sufficient Warrant. Given at His Majesty's Court at Saint James, the fifth day of August 1831, in the Second Year of His Majesty's Reign.

I certify that the foregoing is a true copy of the Warrant for the Royal Charter of the Commercial Bank of Scotland.

Given under my hand at Edinburgh this sixth day of February 1914.

(Signed) J. L. ANDERSON,
Secretary of said Bank. [92]

Plaintiff's Exhibit "C"—Copy of Letter from Commercial Bank of Scotland, Limited, Edinburgh, to Frank Waterhouse.

Copy of Letter from The Commercial Bank of Scotland, Limited, Edinburgh, to Frank Waterhouse, Shipping Agent, Seattle.

31st October 1906.

Dear Sir:

The Directors have resolved to call for payment of the advances to Frank Waterhouse Limited, Salisbury House, London, for which in respect of your letter of Guarantee, dated 16th Feby. 1899, you are responsible to the Bank. I have therefore to request you to make immediate payment of the sum due and relative interest. Annexed is a note of the sum due, with interest to date.

Yours faithfully,
(Signed) J. L. ANDERSON,
Secretary.

Note of sums due by Frank Waterhouse Limited within referred to.

		Interest from 31st Octr 1903 to 31st Octr 1906
Loan A/C	£15000	£2257 . 11 . 11
No I A/C	1151 . 17 . 9	169 . 14 . 10
No II A/C	3479 . 13 . 3	536 . 18 . 10
	<hr/>	<hr/>
	19631 . 11	2964 . 5 . 7
Add Interest	2964 . 5 . 7	
	<hr/>	<hr/>
	22595 . 16 . 7	[93]

**Plaintiff's Exhibit "D"—Assignment, Commercial
Bank of Scotland, Ltd., to John Gill.**

Stamps £5:18/-

We, THE COMMERCIAL BANK OF SCOTLAND LIMITED, incorporated by Royal Charter and Act of Parliament DO hereby for certain good and onerous causes and considerations ASSIGN TO JOHN GILL, Solicitor Supreme Courts, One hundred and twenty-eight George Street, Edinburgh, and his heirs, executors or assignees the Letter of Guarantee granted by Frank Waterhouse, sometime Merchant, Takoma, Washington, United States of America, now Shipping Agent, Seattle, United States of America, dated Sixteenth February Eighteen hundred and ninety-nine whereby the said Frank Waterhouse guaranteed payment to us of all sums for which Frank Waterhouse Limited sometime of One hundred and forty-seven Cannon Street, London, thereafter of Salisbury House there, whether on an account or accounts kept in their name in our books and operated on for them by cheques or drafts signed by two of their Directors and their Secretary all for the time or on Bills, Promissory Notes or other obligations were or might become liable to us but the amount for which he should be liable under the said Guarantee should not exceed Twenty-one thousand pounds Sterling with interest from the date or dates at which the said Frank Waterhouse Limited had become or should become indebted to us as the said Letter of Guarantee which contains sundry other clauses and provisions in itself more fully

bears, with all that has followed or is competent to follow thereon and our whole right, title and interest in and under the same AND SEEING that the sums due to us by the said Frank Waterhouse Limited which are covered by the said Letter of Guarantee to the extent of Twenty-one thousand pounds Sterling with interest as aforesaid amount to the sum of Twenty-two thousand eight hundred and ninety-seven pounds sixteen shillings and [94] fivepence Sterling as at Fifteenth February Nineteen hundred and seven, conform to certified copies of three Accounts annexed hereto, WE hereby ASSIGN to the said John Gill and his foresaid our claim to the said sums with interest as aforesaid against the said Frank Waterhouse to the extent of Twenty-one thousand pounds Sterling and interest thereon from Thirty first October Nineteen hundred and three due to us by the said Frank Waterhouse under the said Letter of Guarantee, with all our right, title and interest in and to the premises to the extent aforesaid, with power to them to ask, crave, sue for and uplift the said sums of principal to the extent aforesaid with interest thereon as aforesaid hereby assigned, and upon payment to grant discharges or conveyances thereof to the extent aforesaid either in whole or in part and generally to do everything in the premises that we might have done before granting hereof: PROVIDED ALWAYS that it shall not be competent to the said John Gill or his foresaids to use our name or instance in any action or steps of procedure to follow hereon: IN WITNESS WHEREOF, these presents are subscribed

for and on behalf of us, the said Commercial Bank of Scotland, Limited, by Neil Ballingall Gunn and Thomas Wardie Tod two of our Ordinary Directors and by Alexander Bogie our Manager, all at Edinburgh, on the Eighth day of October Nineteen hundred and seven, before these witnesses Ernest Edward Leigh Hardinge and George McKenzie, both Clerks in our Head Office there.

N. B. GUNN,
Director.

THOMAS W. TOD,
Director.

ALEX. BOGIE,
Manager.

E. E. L. HARDINGE,
Witness.

GEO. McKENZIE,
Witness. [95]

Plaintiff's Exhibit "D"—Account of Frank Waterhouse, Ltd., with Commercial Bank of Scotland, Ltd.

MESSRS. FRANK WATERHOUSE LIMITED

In Account with COMMERCIAL BANK OF SCOTLAND LIMITED,
LONDON.

GENERAL A/C.

		Dr.			Cr.	
1898.						
Mch.	18	By Loan			1000	
	19	To Cash	649			
		By			1500	
	21	To	1205	9	3	
	22	By			1000	
		To	1000			
		" Stps. & Fee on				
		Guarantee	1		6	
		" Chq. Bk		4	2	
	25	"	500			
		By			2000	
	26	To	152	8	1	
	31	By			2000	
Apl.	1	To	51	16		
		"	509	7		
		"	68	8	7	
		"	333	2	11	
	2	"	6	15	3	
		"	37	13	8	
		"	237	2	4	
		"	1000			
		"	83	11	4	
	4	"	1	18	6	
		"	150			
		"	2	4		
		"	1	6	6	
	5	"	38	13		
		"	45	5	6	
	6	"	7	10	6	
		"	9	3	11	
		By			1000	
			6092	1	.	8500

1898.			Dr.			Cr.		
			6092	1		8500		
April	7	To Cash	1000					
		"	50					
	9	"	1302	12	8			
		"	330	11	10			
	12	By				1000		
	13	To	65					
		"	9	9				
	14	"	500					
		"	17		8			
		"	2	10				
		By				1398	19	7
	15	To	69	7	10			
		"	11	2				
		By				3500		
		To	2000					
	16	By				250		
	18	To	1500					
		By				1000		
	21	To	1000					
	28	By				250		
		To		2	6			
	30	By				2500		
		To	4000					
		By				350		
		To. Com:	1	5				
May	3	" Cable Message		9				
	4	"	493	1	6			
	7	" Loan Interest	62	5	2			
	10	By				900		
	10	To	1025					
	10	" Com.		9				
	12	" Cost of Cable		9				
	16	"	45					
			19577	16	2	19648	19	7

1898.		Dr.			Cr.		
		19577	16	2	19648	19	7
May	20	By Cash			1600		
		To Com.	16				
June	1	" Stamps & Fee	11				
	2	"	42				
	3	" Chq. Bk.	4	2			
	10	"	88	11			
		"	7	9			
	11	"	225				
	18	By				7	
	20	To Com. on £5000					
		at 5%		12	10		
	24	"	5000				
		By			5000		
	25	To	20	16	8		
July	5	"	897	3	7		
	11	"	371	5			
		By			100		
		"			33	8	
Aug.	17	To Stamp		6			
Sep.	2	"	400				
	8	By			1000		
	9	To	2	19	6		
		"	20				
		"	50				
		"	100				
	10	"		17	6		
		" Loan Interest	166	8	4		
	12	" Stps. on Guarantee	1		6		
	17	"	20	4	1		
	19	"	2	1	9		
		"	132	12	6		
	21	"	48	12	6		
Oct.	4	"	5				
		By			200		
[98]		27193	19	9	27582	14	7

1898.		Dr.			Cr.		
		27193	19	9	27582	14	7
Oct.	6	To Cash	266	9	6		
		By			450		
	18	To	400	17	5		
	29	" Cable		12			
		" Com.	12	10			
	31	" Interest		17	4		
		" Interest No. 2 a/c	86	11	7		
		" Interest on Loan	166	2	9		
		By Balance			95	5	9
		£28128		4	28128		4

1898							
Oct.	31	To Balance	95	5	9		
Nov.	12	To Cash	37	10			
	14	By Debit for Com. on					
		29th Oct. reversed			12	10	
	16	To	10				
	29	"	15				
Dec.	1	"	2	3	3		
	19	"	44	11	9		
	20	"	399	12	6		
	22	"	18	17	8		
		"	105				
	24	By			3000		
		To	3000				
		" Com.	1	10			
1899		" Telegram		16			
Jany.	14	" Stamp			6		
	17	" Cablegram	1	14			
	23	By			1000		
		To Com.		10			
	24	"	1098	4	3		
Feb.	4	" Com. on Dexter					
		& Co.	10				
		4840	15	8	4012	10	

1899		Dr.			Cr.		
		4840	15	8	4012	10	
Feb.	4	To Cash Loan Interest	197	5	3		
	6	By			4979	3	4
		To	4979	3	4		
	18	" Cablegram	1	15			
		By			150		
		To	150				
	20	" Stamps & Fee		6			
	25	By			4000		
Mch.	1	To	12	19	10		
		"	62	10			
	2	By			2150		
		To	3950				
	3	" Com.	1	1	6		
		"	21	3	4		
	4	" Cable		14			
		" Dft. Dexter	2000				
	6	" Com. on "	5				
		" " to Melville					
		F. & Co.	7	10			
	13	By			1500		
		To	1500				
	15	" Com.		15			
	17	" Cable		14			
		"	15				
	18	"	2	19	8		
	20	" Chq. Bk.		8	4		
	23		50				
April	4	By			1500		
		To Acceptor	1500				
		Com.	3	15			
		19303	10	5	18291	13	4

1899		Dr.			Cr.		
		19303	10	5	18291	13	4
April	4	To Cash Com.	15				
	28	"	3	7	10		
		By			30		
May	4	To	30				
	6	" Loan Interest	186	19	9		
	14	" Cable	1	15			
June	30	By			19	10	10
		To Com.	5				
Aug.	28	" Acceptee	1000				
		" Com.	2	10			
	31	" "		10			
		By			1000		
Oct.	30	To Loan Interest	365	15			
	31	" This account					
		Interest	48	4	5		
		" Interest on					
		No. 2 a/c.	259	3	7		
		By Balance			1866	6	11

£21207	11	1	21207	11	1
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1899							
Oct.	31	To Balance	1866	6	11		
Nov.	1	By Cash				2000	
	2	To Stps.			1		
		"	85	3	8		
		"	75				
		"	400				
	4	"	400				
1900							
Jany.	13	"	17	7	9		
	19	By				21	6
		To	63	18			
	20	"	21	16	4		
	29	"	5	15			
Feb.	17	By				3000	

2935	7	9	5021	6
------	---	---	------	---

1900			Dr.			Cr.		
			2935	7	9	5021	6	
Feb.	20	To Cash	125					
	21	"	4		6			
	22	"	1	15				
		"	21	5				
		"	1000					
		"	50					
	23	"	1000					
	26	" Loan Interest	221	14	4			
Mch.	9	By				2000		
	12	To	1054	9	11			
	14	"	940					
	23	By				2000		
	27	To	2000					
April	6	By				24	6	11
		To	73		9			
		"	50					
May	5	" Loan Interest	186	19	9			
	24	"	10					
June	11	By				675		
	29	To	10					
July	3	"		16	9			
	7	By				22	3	8
	10	To	66	11	1			
Aug.	3	" Loan Interest	186	19	9			
	14	"	10					
		"	150					
		" Stp.			4			
		"	6	16				
	15	"	160					
		"	3	15				
		"	3	14	2			
	16	"	125	16	8			
	20	"	4	8	2			
			10402	10	11	9742	16	7

1900			Dr.			Cr.		
			10402	10	11	9742	16	7
Aug.	20	To Cash	2		4			
	25	By				3063		
Sep.	1	To	1000					
	3		15					
	4		1000					
	25		15					
Oct.	20		63					
	27	Loan Interest	180	16	6			
	31	This account Do.	23	7	8			
		Interest No. 2 a/c.	279	9				
		By Balance				175	2	10
			<hr/>			<hr/>		
			£12981	4	5	12981	4	5
			<hr/>			<hr/>		

1900								
Oct.	31	To Balance	175	2	10			
Nov.	5	By Cash				4977	8	
		To Stamp	5					
	12	By				5000		
		To Disct.	12	12				
	13	"	839	1	4			
		"	1653	11	11			
	15	"	2460	3	2			
	16	"	652	5	6			
	19	"	2013		5			
	27	"	100					
Decr.	21	By				75	15	5
		To	1000					
1901								
Jany.	10	By				44	1	
	14	To	69	3				
	16	"	10					
		"	51	11	3			
Feb.	1	" Loan Interest	191	1	11			
			<hr/>			<hr/>		
			9232	13	4	10097	4	5

1901			Dr.			Cr.		
			9232	13	4	10097	4	5
Mch.	12	To Cash	21	5				
Apl.	3	"	11	18	8			
	10	"	74		5			
	30	"	150					
		" Loan Interest	189		10			
May	1	By				4656	11	8
	3	To		3	6			
	6	"	700					
		"	1250					
	9	"	2772	7	7			
		"	201	16				
June	1	By				24	13	5
July	2	To	4	9	2			
	25	"	65	18	1			
	31	By				21	19	4
Aug.	3	To Loan Interest	186	19	9			
Oct.	17	"	10					
	18	"	63					
	28	" Loan Interest	182	17	6			
	31	" Interest	1	1	5			
		By Balance				317	2	3
			£15117	11	1	15117	11	1
<hr/>								
1901								
Oct.	31	To Balance	317	2	3			
Nov.	22	By Cash				21		
1902								
Jany.	15					868	7	6
	22		200	5				
			70	6	3			
			587	13	6	889	7	6

Frank Waterhouse.

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1902		Dr.			Cr.		
		587	13	6	889	7	6
Jany.	25 To Cash	15					
Feb.	1 "	18	10				
	"	1	1				
	3 "	282	10				
	7 " Loan Interest	191	1	11			
	10 By				24	8	9
Mch.	1 "				700		
	5 To	75					
	21 "	2	7	10			
April	12 "	72	5	5			
	25 By				24	1	9
	28 To Loan Interest	186	19	9			
May	2 By				918	11	2
	31 To	200	5				
June	4 "	282	10				
June	18 "	2	11	2			
	21 "	1	10	6			
July	1 "	67	3	8			
	17 By				6	5	
	19 To	10					
	24 By				22	7	10
Aug.	2 To Loan Interest	186	19	9			
Sep.	19 "	8					
Octr.	6 By				6	5	
	10 "				21		
	To	63					
	27 " Loan Interest	184	18	7			
	31 " Interest	4		7			
	To Balance	168	18	4			
		£2612	7		2612	7	

1902.			Dr.			Cr.		
Octr.	31	By Balance				168	18	4
Dec.	4	To Cash	150					
1903								
Jany.	13	"	69	3	4			
	14	"	18	10				
Feb.	7	" Loan Interest	203	8	7			
	13	"	75					
Mch.	10	By				15	1	1
	19	To	10					
April	1	By				6	5	
	7	"					25	3
	8	To	72	6				
		"	31	16				
		"	100					
		"	22	18	4			
May	2	" Loan Interest	172	12	1			
	5	By				11	4	7
June	17	To	5					
July	28	"	66	14	1			
	31	By				6	5	
Aug.	1	To Loan Interest	186	19	9			
	6	By				13		8
Oct.	31	To Interest	26	7	6			
Oct.	31	To Loan Interest	186	19	9			
						1151	17	9
						£1397	15	5
1903								
Oct.	31	To Balance	1151	17	9			
1907								
Feb.	15	To Interest from 31st						
		Octr. 1903 to date	191	17				
"	"	By Cash paid by Mr.						
		John Gill, S. S. C.						
		Edinburgh,				1343	14	9
						£1343	14	9

Commercial Bank of Scotland, Ltd.

London, 1st October, 1907.

I certify that the foregoing is a true copy taken from the Ledger.

(Signed) W. B. LANG, Acct. [106]

MESSRS. FRANK WATERHOUSE LD. LOAN ACCOUNT
In Account with COMMERCIAL BANK OF SCOTLAND LIMITED,
LONDON.

		Dr.	Cr.		
1898					
Mch.	18 To Cash	1000			
	19	1500			
	22	1000			
	25	2000			
	31	2000			
Apl.	7	1000			
	15	3500			
	18	1000			
	30	350			
Sep.	8	1000			
Oct.	4	200			
	17	450			
1907					
Feb.	15 To Interest from				
	31st Oct. 1903				
	to date	2471	18	2	
"	" By Cash paid by				
	Mr. John Gill		17471	18	2
		£17471	18	2	17471 18 2

Commercial Bank of Scot. Ld.

London 1st. October, 1907.

I certify the foregoing to be a true statement.

(Signed) W. B. LANG,
Acct.

MESSRS. FRANK WATERHOUSE LIMITED No. 2 ACCOUNT.
In Account with COMMERCIAL BANK OF SCOTLAND LIMITED,
LONDON.

1898.		Dr.				Cr.
June 20	To Cash	5000				
Aug. 12		400				
"					400	
Oct. 31	By Balance				5000	
		<hr/>				
		£5400			5400	
		<hr/>				
1898						
Oct. 31	To Balance	5000				
1900						
Dec. 21	By Cash				1000	
1901						
May 6					1250	
Oct. 31	To Interest	190	10	8		
	By Balance				2940	10 8
		<hr/>				
		£5190	10	8	5190	10 8
		<hr/>				
1901						
Oct. 31	To Balance	2940	10	8		
1902						
Oct. 31	To Interest	151	11	6		
	By Balance				3092	2 2
		<hr/>				
		£3092	2	2	3092	2 2
		<hr/>				
1902						
Oct. 31	To Balance	3092	2	2		
1903						
Sep. 28	To Cash	178	19	7		
Oct. 30	" "	42	1	5		
31	" Interest	166	10	1		
	By Balance				3479	13 3
		<hr/>				
		£3479	13	3	3479	13 3
		<hr/>				

1903			Dr.			Cr.
Oct. 31	To Balance		3479	13	3	
1907						
Feb. 15	To Interest from					
	31st Oct. '03					
	to date		602	10	3	
" "	By Cash paid by Mr.					
	John Gill, S. S. C.					
	Edinburgh				4082	3 6
			£4082	3	6	4082 3 6

Commercial Bank of Scot. Ltd.

London, 1st October, 1907.

I certify that the foregoing is a true copy taken from the Ledger.

(Signed) W. B. LANG,

Acct.

[109]

Edinburgh, 6th February 1914. This is the Assignment by The Commercial Bank of Scotland, Limited, in favor of John Gill, S. S. C., Edinburgh, dated 8th October 1907, referred to in my affidavit of this date.

(Signed) ALEXR. ROBB,
ALEX. GUILD,

Commr.

Edinburgh, 6th February 1914. This is the Assignment by The Commercial Bank of Scotland Limited, in favor of John Gill, S. S. C., Edinburgh, dated 8th October 1907, referred to in my affidavit of this date.

(Signed) J. L. ANDERSON,
ALEX. GUILD,

Commr.

Edinburgh, 6th February 1914. This is the Assignment by The Commercial Bank of Scotland Limited, in favor of John Gill, S. S. C., Edinburgh,

dated 8th October 1907, referred to in my affidavit of this date.

(Signed) W. B. LANG,
ALEX. GUILD,
Commr.

Edinburgh, 27th March 1914. This is the Assignment by The Commercial Bank of Scotland, Limited, in favor of John Gill, W. C. Edinburgh, dated 8th October 1907 and marked "B" referred to in my affidavit of this date.

(Signed) JAMES GILL,
ALEX. GUILD,
Commr. [110]

Portion of Plaintiff's Exhibit "E"—Account, Frank Waterhouse, Ltd. With The Commercial Bank of Scotland, Ltd.

No. II A/C

FRANK WATERHOUSE LTD.

In Account with The Commercial Bank of Scotland Limited, London.

1898			Dr.		Cr.
June	3	To Cost of Cable			
		Message	12		
	20	" 154	5000		
Aug.	12	" 18561	400		
		By		400	
Oct.	29	By reversing 3rd June			12
	31	By Balance		5000	
			£5400	12	5400 12
1898					
Oct.	31	To Balance	5000		
1899					
Oct.	31	By Balance		5000	
			£5000		5000
1899					
Oct.	31	To Balance	5000		
1900					
Oct.	31	By Balance		5000	
			£5000		5000
1900					
Oct.	31	To Balance	5000		
Dec.	21	By		1000	
1901					
May	6	By		1250	
Oct.	31	To Interest	190	10	8
		By Balance		2940	10 8
			£5190	10 8	5190 10 8
1901					
Oct.	31	To Balance	2940	10	8
1902					
Oct.	31	To Interest	151	11	6
		By Balance		3092	2 2
			£3092	2 2	3092 2 2

				Dr.			Cr.		
1902				3092	2	2			
Oct.	31	To Balance							
1903									
Sept.	28	To	15492	178	19	7			
Oct.	30	To	94	42	1	5			
	31	To Interest		166	10	1			
		By Balance					3479	13	3
				£3479	13	3	3479	13	3
1903									
Oct.	31	To Balance		3479	13	3			
1904									
Oct.	31	By Balance					3479	13	3
				£3479	13	3	3479	13	3
1904									
Oct.	31	To Balance		3479	13	3			
1905									
Oct.	31	By Balance					3479	13	3
				£3479	13	3	3479	13	3
1905									
Oct.	31	To Balance		3479	13	3			
1906									
Oct.	31	By Balance					3479	13	3
				£3479	13	3	3479	13	3
1906									
Oct.	31	To Balance		3479	13	3			
1907									
Apr.	24	By Balance					3479	13	3
		By c/a Interest to							
		15 Feb. 1907							
		both per John Gill							
		Edinburgh					65	11	4
		To Interest to 15th							
		Feb. 1907		65	11	4			
				£3545	4	7	3545	4	7

FRANK WATERHOUSE LIMITED.

In LOAN ACCOUNT with THE COMMERCIAL BANK OF SCOTLAND
LIMITED, LONDON.

Date.	Lent.	Balance.	Days.	Rate.	Interest.		
1898							
March 18	1000	1000	1	5		2	9
19	1500	2500	3	"	1		6
22	1000	3500	2	"		19	2
25	2000	5500	6	"	4	10	5
31	2000	7500	7	"	7	3	10
April 7	1000	8500	8	"	9	6	4
15	3500	12000	3	"	4	18	8
18	1000	13000	12	"	21	7	5
30	350	13350	7	"	12	16	1
					62	5	2
May 7		13350					
"		13350	91	5	166	8	4
Aug. 6		13350					
"		13350	33	5	60	7	
Sep. 8	1000	14350	26	"	51	2	2
Octr. 4	200	14550	13	"	25	18	3
17	450	15000	14	"	28	15	4
					166	2	9
31							
	£15000						
Octr. 31	15000	15000	96	5	197	5	3
1899							
Feby. 4		15000	91	5	186	19	9
May 6		15000	178	5	365	15	
Octr. 31							
	£15000						
Oct. 31	15000	15000	44	5	90	8	3
Decr. 14		15000	43	6½	114	17	3
1900							
Jany. 26		15000	6	5	16	8	10
Feby. 3		15000			221	14	4
"		15000	91	5	186	19	9
May 5		15000	91	5	186	19	9
Aug. 4		15000	88	5	180	16	6
Octr. 31							
	£15000						

Date.	Lent.	Balance.	Days.	Rate.	Interest.		
1900							
October 31	15000	15000	93	5	191	1	11
1901							
Feby. 1		15000	92	5	189		10
May 4		15000	91	5	186	19	9
Aug. 3		15000	89	5	182	17	8
Octr. 31							
		<u>£15000</u>					
1901							
Octr. 31	15000	15000	93	5	191	1	11
1902							
Feby. 1		15000	91	5	186	19	9
May 3		15000	91	5	186	19	9
Aug. 2		15000	90	5	184	18	7
Octr. 31							
		<u>£15000</u>					
1902							
October 31	15000	15000	99	5	203	8	7
1903							
Feby. 7		15000	84	5	172	12	1
May 2		15000	91	5	186	19	9
Aug. 1		15000	91	5	186	19	9
Octr. 31							
		<u>£15000</u>					
1903							
October 31	15000	15000	98	5	201	7	5
1904							
Feby. 6			91	5	186	19	9
May 7			177	5	363	13	11
					752	1	1
Octr. 31							
		<u>£15000</u>					
1904							
October 31	15000	15000	187	5	384	4	10
1905							
May 6			178	5	365	15	
					749	19	10
Octr. 31							
		<u>£15000</u>					

Dr.

LOAN A/C.

Interest from 31 Oct. 1903			
to 31 Oct. 1904	752	1	1
from 31 Oct. 1904			
to 31 Oct. 1905	749	19	10
from 31 Oct. 1905			
to 31 Oct. 1906	750		

CURRENT A/C. No. 1.

Interest from 31 Oct. 1903			
to 31 Oct. 1904	52	8	3
from 31 Oct. 1904			
to 31 Oct. 1905	55	4	11
from 31 Oct. 1905			
to 31 Oct. 1906	62	1	11

CURRENT A/C. No. 2.

Interest from 31 Oct. 1903			
to 31 Oct. 1904	182	9	1
from 31 Oct. 1904			
to 31 Oct. 1905	166	18	
from 31 Oct. 1905			
to 31 Oct. 1906	187	11	10

1907

April 24 By John Gill, Edinburgh 2958 14 11

£2958 14 11 2958 14 11

[132]

ANALYSIS OF FOREGOING ACCOUNTS.

I No. 1 A/C.

Sum due to Bank at 31st Octr. 1903	1151	17	9
Interest thereon per Suspence a/c. from 31 Oct.			
1903 to 31 Oct. 1906	169	15	1
Interest from 31st Oct. 1906 to 15 Feby. 1907			
per No. 1 a/c.	22	1	11

II LOAN A/C.

Sum due to Bank at 31 Oct. 1903	15000		
Interest thereon per Susp. a/c. from 31 Oct.			
1903 to 31 Oct. 1906	2252		11
Interest from 31st Oct. 1906 to 15th Feby.			
1907 per Loan a/c.	219	17	3

III No. II A/C.

Sum due to Bank at 31st Octr. 1903	3479	13	3
Interest thereon per Suspence a/c. from 31			
Octr. 1903 to 31st Oct. 1906	536	18	11
Interest from 31st Oct. 1906 to 15 Feby. 1907			
per No. 2 a/c.	65	11	4

£22897 16 5

[133]

**Plaintiff's Exhibit "F"—Articles of Incorporation
of Frank Waterhouse & Co., Inc.**

Volume 7, Articles of Incorporation, Page 83

**ARTICLES OF INCORPORATION
of**

FRANK WATERHOUSE & CO, INC.

Articles of Incorporation of

Know all men by these presents: That we, Frank Waterhouse, **Jas. P. Townsend** and **W. H. Bogle** citizens of the United States of America, and over twenty-one years of age, do hereby associate ourselves together for the pupose of incorporating, and do hereby incorporate, under and in conformity to the laws of the State of Washington, a corporation, and do hereby adopt and certify the following Articles of Incorporation to wit:

Article I.

The name of said corporation shall be **Frank Waterhouse & Co. Inc.**

Article II.

The objects for which said corporation is formed and shall exist are as follows:

First. To build, purchase, charter, rent, acquire, and operate sailing vessels, steamships, steamers, tugs, barges and lighters, to be used in all lawful business upon the ocean, seas, sounds, tide-waters, rivers, and canals for the transportation of passengers, freight and mail; to purchase and erect and lease wharves, dry-docks, store houses and other property; to act as shipping agents and factors

and [134] negotiate charters on commission or otherwise; to acquire, own, locate, lease, sell and operate mines and mining property; to buy and sell merchandise and carry on a mercantile business; to acquire and operate warehouses; and to do any and all other things incident to said business or necessary and proper or convenient to be done in the furtherance of its business.

Second. Said corporation shall have general power:

1. To sue and be sued in any court having competent jurisdiction.

2. To make and use a common seal and to alter the same at pleasure.

3. To purchase, hold, mortgage, sell and convey real and personal property.

4. To appoint such officers, agents, and servants as the business of the corporation shall require; to define their powers, prescribe their duties, and fix their compensation.

5. To require of them such security as may be thought proper for the fulfillment of their duties, and to remove them at will, except that no trustee shall be removed from office unless by a vote of two-thirds of the stockholders.

6. To make by-laws not inconsistent with the organic act of this state, and the laws of the congress of the United States, and of this state.

- 7 To provide for the management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the

objects and purposes of the company, as expressed in the Articles of Incorporation.

Article III.

The capital stock of said company shall be one [135] hundred and fifty thousand (\$150,000) Dollars, divided into Fifteen Hundred (1500) shares of the par value of one hundred Dollars each.

Article IV.

Said corporation shall exist for a period of Fifty (50) years.

Article V.

The business of said corporation shall be managed by a board of three trustees, to be selected annually by the stockholders thereof but the number of trustees may be increased or diminished to any number not less than two at any time by the stockholders.

The Board of Trustees of said corporation, who shall manage its business from the date of its incorporation to the 15th day of March A. D. 1901, shall be composed of the following named persons:

Frank Waterhouse, of Seattle Wash.

W. P. Prichard, of Seattle Wash.

W. H. Bogle, Seattle, Wash.

The first election of Trustees by the stockholders shall be held on the 15th day of March, 1901, and an election of Trustees shall be held annually thereafter; but the corporation may change the time for such election at any time.

Article VI.

The principal place of business and main office of said corporation shall be at Seattle, County of King, and State of Washington.

In Witness Whereof, We, the incorporators, have executed these articles in triplicate, and have subscribed the same [136] this 6th day of October, A. D. 1900.

FRANK WATERHOUSE.

W. H. BOGLE.

JAMES P. TOWNSEND.

State of Washington,
King County,—ss.

Before me, the undersigned Notary Public in and for the State of Washington, personally came and appeared Frank Waterhouse, Jas. P. Townsend and W. H. Bogle to me known and known to me to be the individuals described in and who executed the foregoing instrument, and who acknowledged to me each for himself, that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal this 6th day of October, 1900.

CHAS. H. BENNETT,

Notary Public for Washington, residing therein at
Seattle, said County.

[C. H. B. Not'y Pub. Com. Ex. May 7, 1901.]

[10¢ I. R. Stamp attached. —]

Filed for record at request of Frank Waterhouse
Oct. 8, 1900 at 45 min. past 9 A. M.

E. H. EVENSON,

County Auditor.

By Ellen S. Fish,

Dep. [137]

Exhibit "F"—Oath of Director.

EXHIBIT "F"

District of Columbia,

City and County of Washington,—ss.

Under the provisions of Section 884 of the Revised Statutes of the United States I, Thomas P. Kane Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original oath of Frank Waterhouse, Director of the Boston National Bank of Seattle, Washington, executed on the 26th day of January, 1903, and of the whole of such original on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereto subscribed my name, and caused my Seal of Office to be affixed to these presents, at the Treasury Department in the City of Washington and District of Columbia, this 26th day of November, 1913, A. D.

(Signed) T. P. KANE,

Acting Comptroller of the Currency.

[Seal of Comptroller of the Currency.]

OATH OF DIRECTOR.

State of Washington,

County of King,—ss.

I, the undersigned, Director of the Boston National Bank of Seattle in the State of Washington being a citizen of the United States, and a resident of the State of Washington do solemnly swear that I will, so far as the duty devolves on me, diligently and honestly administer the affairs of said Association;

that I will not knowingly violate, or willingly [138] permit to be violated, any of the provisions of the Statutes of the United States under which this Association has been organized; and that I am the owner, in good faith and in my own right of the number of shares of stock required by said Statutes, subscribed by me or standing in my name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

FRANK WATERHOUSE,

Place of residence: Seattle, Wash.

Subscribed and sworn to this 26th day of January 1903, before the undersigned, a Notary Public in and for said county.

[Official Seal of Officer.]

GEO. F. BEGG,

Notary Public.

Note.—Each director when elected must take the oath of office, and, under section 5147, U. S. R. S., it should be transmitted to the Comptroller of the Currency immediately after the election. If the officer administering the oath has no seal, a certificate of the proper State, county or court official to the effect that such officer is authorized to take acknowledgements must be attached.

162 T 4 [139]

Plaintiff's Exhibit "G"—Oath on Registry.

I, Frank Waterhouse, of Seattle in the County of — and the State of Wash., do swear according to the best of my knowledge and belief, that the steamer or vessel called the "Garonne," of Seattle, is of

burden 3945 tons, gross, and 2319 (Official Number 86504) tons, net, and was built at Gavan, Scotland, in the year one thousand eight hundred and 71, as appears by — Authorized to be registered as an American Vessel by an Act of Congress approved April 27, 1900.

That I am a citizen of the United States of America; and owner of 1/2 of said vessel, together with Chas. Richardson of Tacoma, Wash. 1/2 — citizens of the United States of America are the true and only owners of said vessel, and that no subject or citizen of any foreign power is, directly or indirectly, by way of trust, confidence, or otherwise, interested therein, or in the profits or issues thereof, and that C. G. Conradi, the present master thereof, is a citizen of the United States, having been naturalized at Seattle, Wash. in 1900. SO HELP ME GOD.

(Signed) FRANK WATERHOUSE.

P. O. Address: —————

Subscribed and sworn to before me this 10th day of May, 1900.

S. B. HOUSE,

Dep. Collector of Customs. [140]

MASTER'S OATH.

I, C. G. Conradi, master of the before-mentioned Steamer, do solemnly swear that I am truly a citizen of the United States of America, having been naturalized at Seattle, Wash. 1900. SO HELP ME GOD.

(Signed) C. G. CONRADI.

Subscribed and sworn to before me this 10th day of May, 1900.

S. B. HOUSE,

Dep. Collector of Customs.

"I certify this to be a true copy of the original Oath on Registry on file in this office.

[Seal]

(Signed) CHAS. MILLER,

Deputy Collector.

(10¢ I. R.)

Custom-house, Seattle, Wash., June 20th, 1916."

[141]

Plaintiff's Exhibit "H"—Excerpt from Bankers' Books Evidence Act, 1879.

BANKERS' BOOKS EVIDENCE ACT, 1879
(42 Vict.) (Ch. 11.)

CHAPTER II.

An Act to amend the Law of Evidence with respect to Bankers' Books.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Bankers' Books Evidence Act, 1879.

2. The Bankers' Books Evidence Act, 1876, shall be repealed as from the passing of this Act, but such repeal shall not affect anything which has been done or happened before such repeal takes effect.

3. Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal pro-

ceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded.

4. A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorized to take affidavits.

5. A copy of an entry in a banker's book shall not be [142] received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.

Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorized to take affidavits.

6. A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be provided under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.

7. On the application of any party to a legal proceeding a court or judge may order that such party

be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs.

8. The cost of any application to a court or judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a court or judge made under or for the purposes of this Act shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank, where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding.

9. In this Act the expressions "bank" and "banker" mean [143] any person, persons, partnership, or company carrying on the business of bankers and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any postoffice savings bank.

The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland

Revenue; the fact that any such savings bank is certified under the acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a postoffice savings bank may be proved by a certificate purporting to be under the hand of Her Majesty's Postmaster-General or one of the secretaries of the postoffice.

Expressions in this Act relating to "bankers' books" include ledgers, day-books, cash-books account-books, and all other books used in the ordinary business of the bank.

10. In this Act—

The expression "legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

The expression "the court" means the court, judge, arbitrator, persons, or person before whom a legal proceeding is held or taken;

The expression "a judge" means with respect to England a judge of the High Court of Justice and with respect to Scotland a lord ordinary of the Outer House of the Court of [144] Session, and with respect to Ireland a judge of the High Court of Justice of Ireland;

The judge of a county court may with respect to any action in such court exercise the power of a judge under this Act.

11. Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Act.

"Edinburgh, 27 March, 1914. This is the copy of the Bankers' Books Evidence Act, 1879, marked "A"

referred to in my affidavit of this date.

(Signed) JAMES GILL,
ALEX. GUILD,
Commr." [145]

**Plaintiff's Exhibit "I"—Agreement, October 6, 1910,
Between Frank Waterhouse and Frank Water-
house, Ltd., etc.**

MEMORANDUM OF AGREEMENT, made this Sixth day of October, 1900, between FRANK WATERHOUSE, of Seattle, Washington, of the one part, and FRANK WATERHOUSE, LIMITED, a corporation of London, E. C., of the other part, witnesseth:

1. The said Frank Waterhouse agrees to immediately form and incorporate an American Company, which shall have a paid-up cash capital of at least fifty thousand (50,000) dollars; said company to be empowered by its articles of incorporation to carry on shipping and other kindred business, and to have power to execute bonds, notes, or other evidences of indebtedness, which shall be secured by mortgage or other security upon its assets.

2. Said Frank Waterhouse also agrees and covenants that said company so formed and organized by him shall purchase from said Frank Waterhouse, Limited, subject to the charges affecting the same, all of the assets of every kind and description, legal or equitable, including choses in action, commissions, earnings, as well as the tangible property now belonging to said Frank Waterhouse, Limited, or held in trust for it, and mentioned in the schedule hereto, at and for the prices and sum of two hundred and thirty

thousand (230,000) dollars, payable as follows: Fifty thousand (50,000) dollars cash in hand upon the transfer of said assets to said American company, and the balance of one hundred and eighty thousand (180,000) dollars in ten equal semi-annual payments, to be evidenced by the notes or bonds of said purchasing company, payable as above specified and bearing interest at the rate of five and one-half ($5\frac{1}{2}$) per cent per annum, said interest being payable semi-annually on the first days of November [146] and May of each year; said notes or bonds, with the interest coupons thereon, to be secured by a mortgage upon all of the property and assets of said purchasing company owned at the time of the execution of said mortgage, and upon all property of a similar kind thereafter acquired by said purchasing company during the running of said indebtedness; said notes, bonds or mortgage to be in such form as shall be satisfactory to the attorneys of said vendor company.

3. The said purchasing company, in addition to the price above named, agrees to assume and pay certain indebtedness of said vendor company owing in the State of Washington, U. S. A., as follows: Debts due divers and sundry persons in Seattle or elsewhere, aggregating about \$50,000 a list of which is to be furnished said vendor company with the execution of this agreement. Said vendor company agrees to discharge all of its London indebtedness with said purchase money, except the indebtedness, if any, due Trinder, Anderson & Company, London.

4. Said Frank Waterhouse further agrees and

covenants to waive in favor of said Frank Waterhouse, Limited, any interest or share in the money so paid to said last-named company which may remain after the payment of all the debts of that company and which would otherwise belong to him as a stockholder in said vendor company. And he agrees, in order to carry out and effectuate this article in the agreement, that he will transfer or surrender his shares in said vendor company whenever so requested by said company.

5. That said Frank Waterhouse, Limited, agrees to sell its property and assets to the company to be organized by said Frank Waterhouse upon the terms and at the price hereinabove specified, such transfer to be made immediately upon [147] the organization of said company and on compliance with the agreement of purchase by such American Company as herein stated.

6. Said Frank Waterhouse, Limited, further agrees and covenants that, immediately after the sale and transfer of its said property and assets as herein stipulated it will withdraw from and cease to do or carry on any active business operations, and stop all office or directors' charges and expenses, and will appropriate the proceeds of said sale to the liquidation and payment of the indebtedness of said company as rapidly as may be; such proceeds to be applied, if practicable, in the first instance, to the payment and discharge of such of the debts of said company as are bearing the highest rate of interest.

7. It is expressly agreed, stipulated and covenanted between the parties hereto that said purchas-

ing company shall in no wise be obligated or liable for any indebtedness or liability of said vendor company in England, except as aforesaid, whether now existing or hereafter created or incurred, and that the payment of the purchase price of two hundred and thirty thousand (230,000) dollars for said property and assets and the assumption of the debts shown in the schedule under clause three of this Agreement are the only liabilities to be assumed or incurred by said purchasing company for or on account of said assets and that said Frank Waterhouse personally shall not be liable for the indebtedness of said purchasing company to said vendor company, and said Frank Waterhouse, Limited, shall in no wise be responsible or liable for any debt or liability hereafter created or incurred by said purchasing company.

IN WITNESS WHEREOF, the parties hereto have executed [148] this instrument in duplicate this the sixth day of October, A. D. 1900.

FRANK WATERHOUSE.

FRANK WATERHOUSE, LIMITED.

By JOHN M. MITCHELL.

WILLIAM McEWEN.

Witnesses:

W. H. BOGLE. [149]

SCHEDULE.

1. All right, titles and interest, legal or equitable, in the General Agency for the State of Washington, Alaska and British Columbia for the Equitable Society.

2. All right, title and interest, legal or equitable,

in the leasehold interest in offices of the Company at Seattle, Wash., and in the furniture, fixtures, and stationery thereof.

3. All interest, legal or equitable, in the steamer "Winthrop."

4. All interest, legal or equitable, in the warehouse and lot on which same is situated, erected by the company at Nome, Alaska.

5. All right, title and interest, legal or equitable, of, and into all book debts, accounts, claims, choses in action and dues owing to the company by any persons, firms or companies whatsoever.

6. All interest and right of said company in and to commissions earned and to be earned upon existing charters of vessels to the United States Government.

7. All interest and right of said company in and to the charter moneys accruing from the United States Government on the existing character of the S. S. "Garonne."

8. All interest and right of said company in and to all liquors and wines, goods and merchandise belonging to it or in which it is interested, now in Seattle, Wash., Nome, Alaska, or elsewhere.

9. All other property of every kind and description, real, personal, shipping, agencies and goodwill, things possessed and choses in action, either held by the company or [150] by others in trust for it, wheresoever located or howsoever held.

10. All right, title or interest, as shareholder or otherwise, in the Yorke Lighterage Company, and all claims for advances and moneys paid out for the benefit of said Yorke Lighterage Company.

(Sig.) WILLIAM McEWEN. [151]

FRANK WATERHOUSE, LIMITED.

Unpaid Bills, October 5, 1900.

A. D. T. Co.....	3.70
F. P. Dow.....	11.00
Felitz Tent and Awning Co.....	8.00
W. P. Fuller & Co.....	136.65
Golden Rule Bazar.....	.90
Golden Wall Paper Co.....	65.90
Hanes & Gallenes.....	7.50
Lowman & Hanford S. & P. Co.....	116.13
Moran Bros. Co.....	3,822.14
N. W. Imp. Co. Nome Coal.....	1,110.44
Meyer & Co.....	14.25
N. W. Fixture Co.....	117.95
Official Gazette.....	5.00
Post Intelligencer Co.....	170.55
Seattle Ice Co.....	1.75
Seattle Brewing & Malting Co.....	100.00
Seattle Hardware Co.....	1.95
H. L. Dizer.....	3.80
Standard Oil Co.....	295.94
Schwabacher Bros. & Co.....	3,478.61
Seattle Market.....	3,451.68
Stewart & Holmes Drug Co.....	94.65
Seattle Electric Co.....	4.00
Seattle Transfer Co.....	195.75
Vaas & Co.....	.60
Washington Rubber Co.....	5.00
Western Union Telegraph Co.....	2.00
Liquors, Petty Bills & Salesman expense claims.....	50.00

Trinder, Anderson & Co.....	13,275.00
Note at Puget Sound National Bank.....	15,000.00
Unpaid Salaries to Oct. 1.....	950.00
"Garonne" Pay Roll, 2 Mos. from Aug. 6.	8,560.00
Hawaiian Tramway Co.....	127.00
Bogle & Richardson.....	775.00

\$38,687.84

Endorsed notes of Yorke Lighterage Co.

for..... 13,000.00

\$51,687.84

[152]

Order Settling Bill of Exceptions.

The foregoing entitled cause coming on regularly for hearing before the Court on this 14th day of December, A. D. 1916, the time duly designated by the Court for settling and certifying the bill of exceptions herein, the plaintiff and defendant now appearing by their respective attorneys of record herein, and the said plaintiff having, within the time, extended by stipulation and the order of the Court herein, for that purpose, duly proposed the foregoing as the bill of exceptions in said action, and the parties now agreeing to the settlement of the foregoing as the bill of exceptions therein;

Now, therefore, it is by the Court and the Judge of said court presiding at the trial of said cause **ORDERED AND CERTIFIED** that the foregoing be, and the same hereby is, settled as the true bill

of exceptions in said cause, and that said bill of exceptions, together with the exhibits therein referred to and thereto attached, includes all the material facts and evidence herein, and the same is hereby approved, allowed and made a part of the record herein; and the same being so settled and certified, it is hereby ordered to be filed herein by the clerk.

JEREMIAH NETERER,
Judge. [153]

Copy of within Proposed Bill of Exceptions received, and due service of same acknowledged this 30th day of September, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

[Indorsed]: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [154]

[Title of Court and Cause.]

Assignment of Errors.

The above-named plaintiff, in connection with and as a part of his petition for a writ of error filed herein, makes the following assignment of errors, which he avers were committed by the Court in the rendition of the judgment against this plaintiff, appearing upon the record herein:

I.

The Court erred in rejecting the following evidence offered by the plaintiff upon said trial, to wit:

A certified copy of the Bankers' Books Evidence Act, 1879 (42 Vict. Chap. 11).

II.

The Court erred in rejecting the following evidence offered by the plaintiff upon said trial, to wit:

An assignation made by The Commercial Bank of Scotland, Limited, in favor of John Gill, and dated October 8, 1907, same being exhibit "D" attached to the bill of exceptions. [155]

III.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to wit:

The account between the Commercial Bank of Scotland, Ltd., and Frank Waterhouse, Ltd., which said account is attached to the assignation described in Assignment of Error II herein.

IV.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to wit:

"The payment of £22,897:16:5 was made to the bank by the said John Gill in exchange for the assignation in his favor. The payment was made by a cheque of his own I understand. I have not the particulars of the cheque."

V.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to wit:

"I have examined the copy of the accounts of Frank Waterhouse, Ltd., with the Commercial Bank of Scotland, Ltd., appended to the deposition of George Sutherland Coutts, taken on the 17th December 1913, and I am satisfied that said accounts

correctly set forth the amount advanced to said Frank Waterhouse, Ltd. The amounts due by Frank Waterhouse, Ltd., to the bank at 31st October, 1903, were as follows:— (1) On the current or general account £1151. 17. 9. (2) On the loan account £15,000 and (3) on No. 2 account £3479. 13. 3. These amount in all, with interest to February 15, 1907, to £22,897. 16. 5.” [156]

VI.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to wit:

“Subsequently I wrote to the Commercial Bank of Scotland, Ltd., intimating my appointment and asking them to send me a certified statement of their claims in the liquidation. They informed me that the company’s indebtedness to them had been settled by Mr. John Gill, S.S.C. Edinburgh, and that they had assigned their claim to him.”

VII.

The Court erred in receiving the following evidence offered by the defendant herein upon said trial, to wit:

An agreement made on the 6th day of October, 1900, between Frank Waterhouse, of Seattle, Washington, of the one part, and Frank Waterhouse, Limited, a corporation of London, E. C., of the other part, which said agreement is attached to the bill of exceptions herein marked exhibit “I” and made a part thereof.

VIII.

The Court erred in rejecting the following evidence offered by said plaintiff upon said trial, to wit:

A copy of account identified by William McEwen, and which said account is attached to the bill of exceptions herein, marked exhibit "E" and made a part of said bill of exceptions.

IX.

The Court erred in holding and deciding that the testimony introduced in said cause was not sufficient to warrant [157] a verdict in favor of plaintiff.

X.

The Court erred in withdrawing the cause from the jury.

XI.

The Court erred in rendering a judgment of dismissal of said cause.

WHEREFORE, plaintiff prays that the judgment of the Honorable District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that such direction be given that full relief may inure to plaintiff by virtue of his writ of error.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff.

Copy of within Assignment of Errors received and due service of same acknowledged this 14th day of December, 1916.

BOGLE et al. & PRESTON,

BOGLE, GRAVES, M. & B.,

Attorneys for Defendant.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [158]

[Title of Court and Cause.]

Petition for Writ of Error.

Now comes the above-named plaintiff and says that on or about the 10th day of July, 1916, this Court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this plaintiff prays that a writ of error may issue in his behalf out of the United State Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals; and further prays that an order be made fixing the amount of security which the said petitioner shall give upon said writ of error.

Dated December 14th, 1916.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff. [159]

Copy of within petition for order allowing writ of error received and due service of same acknowledged this 14th day of December, 1916.

PRESTON & THORGRIMSON,

BOGLE, GRAVES, M. & B.,

Attorneys for Defendant. [160]

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [161]

[Title of Court and Cause.]

Order Allowing Writ of Error.

This 14th day of December, 1916, came the plaintiff, by his attorneys, and filed herein and presented to the Court his petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the plaintiff giving bond, according to law, in the sum of three hundred (\$300) dollars.

JEREMIAH NETERER,

Judge.

[Indorsed]: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [162]

Copy of this order granting writ of error and fixing amount of bond received and due service of

same acknowledged this 14th day of December, 1916.

PRESTON & THORGRIMSON,

BOGLE, GRAVES, M. & B.,

Attorneys for Defendant.

[Indorsed]: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [163]

[Title of Court and Cause.]

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, Maurice McMicken, as administrator with the will annexed of John Gill, deceased, the above-named plaintiff, as principal, and the United States Fidelity and Guaranty Company, a body corporate, duly incorporated under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as surety, executing this bond on behalf of said principal, are jointly and severally held and firmly bound unto Frank Waterhouse, the defendant above-named, his heirs, executors, administrators and assigns, in the just and full sum of three hundred (\$300) dollars, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly¹ by these presents.

Sealed with our seals and dated this 14th day of December, A. D. 1916. [164]

THE CONDITION OF THIS OBLIGATION IS SUCH THAT WHEREAS, in the above-entitled action a judgment was entered on the 12th day of July, 1916, dismissing the said action and awarding costs; and

WHEREAS, the said plaintiff has obtained from said Court a writ of error to reverse the said judgment in said action, and a citation directed to the defendant is about to be issued, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California;

NOW, THEREFORE, if the said plaintiff shall prosecute the said writ of error to effect and shall answer all costs that may be awarded against him if he shall fail to make good his plea, then the above obligation to be void; otherwise to remain in full force and effect.

MAURICE McMICKEN,
As Administrator With the Will Annexed of John
Gill, Deceased.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY.

[Seal]

By GROVER C. WINN,
Its Attorney in Fact. [165]

Sufficiency of the surety on the foregoing bond approved by me this 14th day of December, A. D. 1916.

JEREMIAH NETERER,
Judge of Said Court.

Copy of within cost bond received and due service

of same acknowledged this 14th day of December,
A. D. 1916.

PRESTON & THORGRIMSON,
BOGLE, GRAVES, M. & B.,
Attorneys for Defendant.

[Indorsed]: Cost Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [166]

[Title of Court and Cause.]

Writ of Error.

United States of America,
Ninth Judicial District,—ss.

The President of the United States, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between John Gill, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased, plaintiff, and Frank Waterhouse, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, [167] if judgment be therein given, that then under your seal,

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said Court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place, in said circuit on the 10th day of January next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 14th day of December, A. D. 1916, and in the one hundred and forty-first year of the Independence of the United States of America.

FRANK L. CROSBY,
Clerk of said District Court of the United States
for the Western District of Washington.

The foregoing writ is hereby allowed.

JEREMIAH NETERER,
United States District Judge for the Western District of Washington.

Received copy of the foregoing writ of error, lodged with me for defendant in error, this 14th day of December, 1916.

FRANK L. CROSBY,
Clerk.

By Ed M. Lakin,
Deputy. [168]

Copy of within writ of error received and due service of same acknowledged this 14th day of December, 1916.

PRESTON & THORGRIMSON,
BOGLE, GRAVES, M. & B.,
Attorneys for Defendant in Error.

[Indorsed]: No. 1633. Original. In the United States Circuit Court of Appeals for the Ninth Circuit. John Gill, for Whom has been Substituted Maurice McMicken, Administrator with the Will Annexed of John Gill, Deceased, Plaintiff in Error, vs. Frank Waterhouse, Defendant in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. Hughes, McMicken, Dovell & Ramsey, Attorneys for Plaintiff in Error. 661-670 Colman Building, Seattle, Wash. [169]

[Title of Court and Cause.]

Citation on Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

To Frank Waterhouse, Defendant in Error:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said circuit, on the 10th day of January, 1917, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western Dis-

trict of Washington Northern Division, wherein said John Gill, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why [170] speedy justice should not be done to the parties in that behalf.

Dated this 14th day of December, 1916.

PRESTON & THORGRIMSON,
BOGLE, GRAVES, M. & B.,

United States District Judge for the Western District of Washington.

FRANK L. CROSBY,
Clerk of said United States District Court for the Western District of Washington.

Copy of within citation received and due service of same acknowledged this 14th day of December, 1916.

PRESTON & THORGRIMSON,
BOGLE, GRAVES, M. & B.,
Attorneys for Defendant in Error.

[Indorsed]: Original. No. 1633. In the United States Circuit Court of Appeals for the Ninth Circuit. John Gill, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased, Plaintiff in Error, vs. Frank Waterhouse, Defendant in Error. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Divi-

sion. Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. Hughes, McMicken, Dovell & Ramsey, Attorneys for Plaintiff in Error, 661-670 Colman Building, Seattle, Wash. [171]

[Title of Court and Cause.]

Writ of Error.

United States of America,
Ninth Judicial District,—ss.

The President of the United States to the Honorable
Judges of the District Court of the United
States for the Western District of Washington,
Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between John Gill, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased, plaintiff, and Frank Waterhouse, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, [172] if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city of San Francisco, in the State of

California, together with this writ, so that you have the same at the said place, in said circuit, on the 10th day of January next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 14th day of December, A. D. 1916, and in the one hundred and forty-first year of the Independence of the United States of America.

FRANK L. CROSBY,
Clerk of said District Court of the United States for
the Western District of Washington.

The foregoing writ is hereby allowed.

(Sgd.) JEREMIAH NETERER,
United States District Judge for the Western Dis-
trict of Washington.

Received copy of the foregoing writ of error,
lodged with me for defendant in error, this 14 day
of December, 1916.

Clerk of the United States District Court for the
Western District of Washington. [173]

Copy of within writ of error received and due ser-
vice of same acknowledged this 14 day of December,
1916.

Attorneys for Defendant in Error. [174]

[Endorsed]: No. —. (Lodged Copy.) In the United States Circuit Court of Appeals for the Ninth Circuit. John Gill, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased, Plaintiff in Error, vs. Frank Waterhouse, Defendant in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [175]

[Title of Court and Cause.]

Citation on Writ of Error.

United States of America,
Ninth Judicial District,—ss.

To Frank Waterhouse, Defendant in Error:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said circuit, on the 10th day of January, 1917, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein said John Gill, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why [176]

speedy justice should not be done to the parties in that behalf.

Dated this 14 day of December, 1916.

(Sgd.) JEREMIAH NETERER,
United States District Judge for the Western District of Washington.

FRANK L. CROSBY,
Clerk of said United States District Court for the Western District of Washington.

Copy of within citation received and due service of same acknowledged this 14 day of December, 1916.

Attorneys for Defendant in Error. [177]

[Endorsed]: No. —. (Lodged Copy.) In the United States Circuit Court of Appeals for the Ninth Circuit. John Gill, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased, Plaintiff in Error, vs. Frank Waterhouse, Defendant in Error. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [178]

[Title of Court and Cause.]

Stipulation as to Printing of Record.

For the sake of brevity and to avoid unnecessary expense, IT IS HEREBY STIPULATED that in the printed transcript of record of the above-entitled cause there shall be omitted from all pleadings, orders and proceedings (other than the amended

complaint, answer, reply, order of substitution and judgment of dismissal) the title of the court and the number and title of the cause; and that the copy of the accounts annexed to the assignment (which said assignment, together with the accounts thereto annexed, is attached to the bill of exceptions and marked exhibit "D" thereof) need only be printed, and it shall not be necessary to print any other copy of said accounts.

Dated Seattle, Washington, December 18, 1916.

HUGHES, McMICKEN, DOVELL &
RAMSEY,

Attorneys for Plaintiff.

BOGLE, GRAVES, MERRITT & BOGLE,
PRESTON & THORGRIMSON,

Attorneys for Defendant.

[Indorsed]: Stipulation as to Printing of Record.
Filed in the U. S. District Court, Western Dist. of
Washington, Northern Division. Dec. 21, 1916.
Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.
[179]

[Title of Court and Cause.]

Stipulation as to Record.

IT IS HEREBY STIPULATED, between the parties hereto, that the clerk of this court, in making up his return to the writ of error herein, shall include therein the following:

Amended Complaint;

Answer;

Reply;

Order of Substitution of Maurice McMicken;
Judgment of Dismissal;
Bill of Exceptions;
Assignment of Errors;
Petition for Order Allowing Writ of Error;
Order Granting Writ of Error and Fixing Amount
of Cost Bond;
Cost Bond;
Writ of Error;
Copy of Writ of Error Lodged with Clerk for De-
fendant in Error;
Original Citation, and acceptance of service thereof;
Copy of Citation lodged with clerk for defendant in
error; [180]
Stipulation as to printing Transcript of Record;
Stipulation as to the Record;
—which comprises all the papers, exhibits, deposi-
tions and other proceedings which are necessary to
the hearing of said cause upon such writ of error in
the United States Circuit Court of Appeals for the
Ninth Circuit, and that no other papers or proceed-
ings than those above mentioned need be included
by the clerk of said court in making up his return
to said writ of error as a part of such record; pro-
vided, however, that either party may supplement
the record by adding thereto any matter of record
not hereinbefore mentioned.

Dated December 18, 1916.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Plaintiff.
BOGLE, GRAVES, MERRITT & BOGLE, and
PRESTON & THORGRIMSON,
Attorneys for Defendant.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.
HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Plaintiff.

[Endorsed]: Stipulation as to Record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 21, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [181]

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 181 typewritten pages, numbered 1 to 181, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, exhibits, depositions and other proceedings in the above and foregoing cause, as are necessary to the hearing of said cause on Writ of

Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit [182] Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.), for	
making record, certificate or re-	
turn, 401 folios at 15¢.....	\$60.15
Certificate of Clerk to transcript of	
record, 4 folios at 15¢.....	.60
Seal to said Certificate.....	.20
	<hr/>
Total,	\$60.95

I hereby certify that the above cost for preparing and certifying record amounting to \$60.95, has been paid to me by Messrs. Hughes, McMicken, Dovell & Ramsey, Attorneys for Plaintiff in Error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 26th day of December, 1916.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court. [183]

[Title of Court and Cause.]

Writ of Error.

United States of America,
Ninth Judicial District,—ss.

The President of the United States to the Honorable
Judges of the District Court of the United States
for the Western District of Washington, Northern
Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between John Gill, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased, plaintiff, and Frank Waterhouse, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, [184] if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the

city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place, in said circuit, on the 10th day of January next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 14th day of December, A. D. 1916, and in the one hundred and forty-first year of the Independence of the United States of America.

FRANK L. CROSBY,

Clerk of Said District Court of the United States for the Western District of Washington.

The foregoing writ is hereby allowed.

JEREMIAH NETERER,

United States District Judge for the Western District of Washington.

Received copy of the foregoing writ of error, lodged with me for defendant in error, this 14 day of December, 1916.

FRANK L. CROSBY,

Clerk.

By Ed. M. Lakin,

Deputy. [185]

Copy of within writ of error received and due service of same acknowledged this 14 day of December, 1916.

PRESTON & THORGRIMSON,
BOGLE, GRAVES, M. & B.,
Attorneys for Defendant in Error. [186]

[Endorsed]: No. —. Original. In the United States Circuit Court of Appeals for the Ninth Circuit. John Gill, for whom has been Substituted Maurice McMicken, Administrator With the Will Annexed of John Gill, Deceased, Plaintiff in Error, vs. Frank Waterhouse, Defendant in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [187]

[Title of Court and Cause.]

Citation on Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

To Frank Waterhouse, Defendant in Error:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said circuit, on the 10th day of January, 1917, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein said John Gill, for whom has been substituted

Maurice McMicken, Administrator, with the will annexed of John Gill, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why [188] speedy justice should not be done to the parties in that behalf.

Dated this 14 day of December, 1916.

JEREMIAH NETERER,
United States District Judge for the Western Dis-
trict of Washington.

FRANK L. CROSBY,
Clerk of Said United States District Court for the
Western District of Washington.

Copy of within citation received and due service
of same acknowledged this 14 day of December, 1916.

PRESTON & THORGRIMSON,
BOGLE, GRAVES, M. & B.,
Attorneys for Defendant in Error. [189]

[Endorsed]: No. ——. Original. In the United States Circuit Court of Appeals for the Ninth Circuit. John Gill, for Whom has been Substituted Maurice McMicken, Administrator with the Will Annexed of John Gill, Deceased, Plaintiff in Error, vs. Frank Waterhouse, Defendant in Error. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [190]

[Endorsed]: No. 2903. United States Circuit Court of Appeals for the Ninth Circuit. John Gill, for Whom has Been Substituted Maurice McMicken, Administrator With the Will Annexed of John Gill, Deceased, Plaintiff in Error, vs. Frank Waterhouse, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed December 29, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2886.

United States
Circuit Court of Appeals
Ninth Circuit.

VINEYARD LAND & STOCK COMPANY, A CORPORATION; AND
THE UTAH CONSTRUCTION COMPANY, A CORPORATION
Appellants,

vs.

TWIN FALLS, OAKLEY LAND AND WATER COMPANY,
A CORPORATION; AND OAKLEY CANAL COMPANY, A COR-
PORATION,

Appellees.

Brief for Appellants.

FRANK K. NEBEKER,
C. A. BOYD,
EDWIN SNOW,
C. B. HENDERSON,
Solicitors for Appellants.

HOWAT, MARSHALL,
MACMILLAN & NEBEKER,
Of Counsel.

Filed

JAN 30 1917

F. D. Monckton,
Clerk.



No. 2386.

United States
Circuit Court of Appeals
Ninth Circuit.

VINEYARD LAND & STOCK COMPANY, A CORPORATION; AND
THE UTAH CONSTRUCTION COMPANY, A CORPORATION,
Appellants,

vs.

TWIN FALLS, OAKLEY LAND AND WATER COMPANY,
A CORPORATION; AND OAKLEY CANAL COMPANY, A COR-
PORATION,
Appellees.

Brief for Appellants.

(Figures in parentheses refer to pages of printed transcript.)

STATEMENT OF THE CASE.

This suit was brought by the appellees, Twin Falls Oakley Land and Water Company and Oakley Canal Company, against appellants, Vineyard Land and Stock Company, and The Utah Construction Company, and involves conflicting claims of rights in and to the waters of Goose Creek, an interstate stream whose course extends through the northern part of Elko County, Nevada, into and through the southerly part of Cassia County, Idaho.

Appellee, Twin Falls Oakley Land and Water Company, is a corporation of Delaware, and appellee, Oakley Canal Company, is an Idaho corporation. Both appellants are Utah corporations. Hereafter we will refer to appellees as plaintiffs and appellants as defendants.

Plaintiffs in their bill allege in substance (7-21) that plaintiff, Twin Falls Oakley Land and Water Company, was organized for the purpose of constructing irrigation works in the State of Idaho, under a contract with said State, and that plaintiff, Oakley Canal Company, was organized for the purpose of taking over and operating the works when constructed; that said works were to be constructed in accordance with the provisions of said contract with the State of Idaho (22-39) for the purpose of irrigating approximately 44,000 acres of land in Cassia County, Idaho, from the waters of said Goose Creek; that said works, consisting of a reservoir and distributing system, had been fully completed according to the contract; that plaintiff, Twin Falls Oakley Land and Water Company, was the holder of two permits from the State Engineer of the State of Idaho, one number 3751 for 500 cubic feet per second, and the other number 4731 for 1,000 cubic feet per second, of the waters of said Goose Creek. That the applications for said permits were filed respectively on the 27th day of March, 1908, and the 10th day of March, 1909. That in addition to the rights evidenced by said permits, plaintiffs were also the

owners of the right to use 300 second feet of the waters of said Goose Creek under rights acquired from individuals who had appropriated said waters before any other rights had been acquired in or to the waters of said stream; that the waters to which plaintiffs were entitled under their several rights referred to are, and in the future would be, needed for the irrigation of the lands under plaintiffs' system. That the defendant, Vineyard Land and Stock Company, had constructed and was at the time of the commencement of the action, engaged in the construction of canals and ditches in the State of Nevada for the purpose of using the waters of said Goose Creek upon lands belonging to said defendant and for the purpose of preventing the same from flowing into the State of Idaho for use there by plaintiffs and the stockholders of said Oakley Canal Company; that said defendant would, unless prevented from so doing by the decree of the Court, prevent the use of said waters by said plaintiffs or the stockholders of said Oakley Canal Company; that plaintiffs were unable to ascertain the exact nature or extent of the claim made by the defendants to the right to use the waters of said stream, but that all of defendant's rights therein were subsequent and subject to the rights of plaintiffs and the stockholders of said Oakley Canal Company, which rights aggregate 1800 second feet, being the entire flow of said stream and its tributaries above plaintiffs' point of diversion; that

both defendants are the owners of lands in the State of Nevada, and that defendant, The Utah Construction Company, is the owner of nearly all of the capital stock of the defendant, Vineyard Land and Stock Company, and controls and directs its operations.

Plaintiffs prayed that their rights and the rights of those claiming under them in and to the use of the waters of said Goose Creek, be adjudged and decreed to be prior and superior to the rights of the defendants, and that plaintiffs' right and title to the use of said water be determined and quieted; that the defendants, their agents, servants and successors in interest, be forever enjoined and restrained from diverting and using the waters of said Goose Creek, or any of the tributaries thereof, above plaintiffs' point of diversion, and that a temporary restraining order be issued pending suit.

The defendants in their answer to the bill (51-65) admitted the allegations therein concerning the corporate existence of the parties; alleged that the defendants were without knowledge concerning any of the matters connected with the plaintiffs' alleged acquisition of water rights in Goose Creek by appropriation or private grant; admitted that Goose Creek, above plaintiffs' place of diversion, is formed by various small streams and creeks having their sources in the main in the State of Nevada, but to some extent in the State of Idaho, and that its tributaries flow together in the State of Nevada, forming said Goose Creek, and from thence that said stream flows northward into said Cassia County, Idaho, and empties into

Snake River in said State; admitted that the Vineyard Land and Stock Company had constructed and at the time of the filing of the bill was engaged in constructing canals and ditches in the State of Nevada, for the purpose of diverting and using the waters of Goose Creek and its tributaries; denied that the purpose thereof was to prevent plaintiffs, or the stockholders of said Oakley Company from using whatever waters from said streams they or either of them were entitled to; denied that the rights to said waters of the defendant Vineyard Land and Stock Company, as set forth in the answer, were subsequent or subject to the rights of the plaintiffs, or either of them; admitted that defendant, The Utah Construction Company, was at the time of the commencement of said suit, the owner of nearly all of the capital stock of the said Vineyard Land and Stock Company, but denied that it controls or directs the operations of said Vineyard Land and Stock Company; alleged that about 6,000 acres of land belonging to the said Vineyard Land and Stock Company are located along and adjacent to said Goose Creek and its tributaries in the State of Nevada, and that said lands were high and arid and not suitable for tillage or cultivation or for the growing of crops without irrigation; that said 6,000 acres were so located as to be susceptible of irrigation from the waters of Goose Creek and its tributaries and that the same when so irrigated were capable of producing valuable crops of wild hay, alfalfa, grain and vegetables; that said 6,000 acres of land are the only lands in the State of

Nevada capable of being irrigated from the waters of said Goose Creek and its tributaries, and that no more than a fair and equitable proportion of the said waters would be required for the irrigation thereof; that practically all of said lands are situated within one-half mile from the channels of said streams and that if the waters thereof were diverted to and upon said lands for irrigation purposes, the same, with the exception of a comparatively small quantity thereof, would immediately flow back into the said channels and thence into the plaintiffs' reservoir; that the defendant, Vineyard Land and Stock Company, claims the right to the use of all of the waters of Goose Creek and its tributaries to which the State of Nevada and its citizens and landholders are entitled under a fair and equitable apportionment between the State of Nevada and its citizens and land holders and the State of Idaho, and its citizens and land holders; that long prior to the date of the alleged appropriation of the waters of Goose Creek and its tributaries by plaintiffs, the predecessors in interest of the Vineyard Land and Stock Company entered upon said streams and by means of dams, canals and ditches appropriated and diverted for irrigation purposes about 40 second feet of the waters thereof. That at the time of filing the answer the defendant, Vineyard Land and Stock Company, had under cultivation about 4,000 acres of said land, and by means of dams, canals and ditches had appropriated and diverted and used of the waters of said Goose Creek and its tributaries approximately 80 second feet.

The issues so presented were tried in April, 1915. The Court rendered its decision in writing (278-284) on December 11th, 1915, and made and entered its decree, (284-293) from which this appeal is taken, on the 30th day of March, 1916. The Court decreed to plaintiffs water rights aggregating 145,200 acre feet, with priorities as follows (285):

825 acre feet under their appropriation made May 1st, 1878.

275 acre feet under their appropriation made May 1st, 1879.

687.5 acre feet under their appropriation made May 1st, 1880.

2337.5 acre feet under their appropriation made May 1st, 1882.

1375 acre feet under their appropriation made May 1st, 1883.

8250 acre feet under their appropriation made May 1, 1884.

4125 acre feet under their appropriation made May 1, 1888.

500 cubic feet per second by virtue of their appropriation made March 27, 1908, under permit number 3751.

600 cubic feet per second under their appropriation made March 10, 1909, under permit number 4731.

To the defendants the Court decreed rights as follows:

200 acre feet under their appropriation made May 1, 1875, for use on their Winecup ranch.

650 acre feet under their appropriation made May 1st, 1883, for use on their Grande ranch.

250 acre feet under their appropriation made May 1st, 1886, for use on their Winecup ranch.

150 acre feet under their appropriation made May 1st, 1889, for use on their Grande ranch.

400 acre feet under their appropriation made May 1st, 1900, for use one-half on the Winecup ranch and one-half on the Grande ranch.

285 acre feet under their appropriation made May 1st, 1904, for use on their Spring Creek ranch.

The Court decreed that no one holding a subsequent appropriation should be entitled to receive water until all prior appropriations had been fully satisfied; that within the amounts of their annual rights, defendants might divert for use upon their lands (in Nevada) at the rate of not more than six and one-half cubic feet per second for defendants' property known as the Winecup ranch, and not more than nine cubic feet per second for the property known as the Grande ranch, and not to exceed two and one-half cubic feet per second upon defendants' property known as the Spring Creek ranch; it was decreed that defendants be perpetually enjoined from using any more water or any water in any different manner from that prescribed by the provisions of the de-

cree; that all waters diverted by the defendants be measured at the points of diversion from the natural channel, and that no waters could be diverted except through conduits so constructed as to accurately measure the water; that the defendants install measuring devices at their several points of diversion along the stream and its tributaries (in Nevada), all such devices to be of such design as to automatically register the amounts of water diverted; that such measuring devices should at all times be subject to the reasonable inspection of plaintiffs, and that plaintiffs should have the right to go upon and over the lands of defendants (in Nevada) where such measuring devices are situated, to inspect the same.

By the provisions of the decree the court retained jurisdiction (292) of the cause for the purpose of making reasonable rules touching the manner of diverting, measuring and distributing the waters and devices to be installed and used for such purposes, and for the purpose of directing that the parties keep accurate and detailed records of the amounts of water diverted, and to require reports to be filed from time to time of the amounts so diverted, and to appoint commissioners or water masters to make distribution in accordance with the terms of the decree.

The decree also specifically describes, by legal subdivisions, the particular tracts of land in the State of Nevada, upon which the defendants would be permitted to use the waters awarded to them in the decree.

To the defendants the Court decreed rights as follows:

200 acre feet under their appropriation made May 1, 1875, for use on their Winecup ranch.

650 acre feet under their appropriation made May 1st, 1883, for use on their Grande ranch.

250 acre feet under their appropriation made May 1st, 1886, for use on their Winecup ranch.

150 acre feet under their appropriation made May 1st, 1889, for use on their Grande ranch.

400 acre feet under their appropriation made May 1st, 1900, for use one-half* on the Winecup ranch and one-half on the Grande ranch.

285 acre feet under their appropriation made May 1st, 1904, for use on their Spring Creek ranch.

The Court decreed that no one holding a subsequent appropriation should be entitled to receive water until all prior appropriations had been fully satisfied; that within the amounts of their annual rights, defendants might divert for use upon their lands (in Nevada) at the rate of not more than six and one-half cubic feet per second for defendants' property known as the Winecup ranch, and not more than nine cubic feet per second for the property known as the Grande ranch, and not to exceed two and one-half cubic feet per second upon defendants' property known as the Spring Creek ranch; it was decreed that defendants be perpetually enjoined from using any more water or any water in any different manner from that prescribed by the provisions of the de-

cree; that all waters diverted by the defendants be measured at the points of diversion from the natural channel, and that no waters could be diverted except through conduits so constructed as to accurately measure the water; that the defendants install measuring devices at their several points of diversion along the stream and its tributaries (in Nevada), all such devices to be of such design as to automatically register the amounts of water diverted; that such measuring devices should at all times be subject to the reasonable inspection of plaintiffs, and that plaintiffs should have the right to go upon and over the lands of defendants (in Nevada) where such measuring devices are situated, to inspect the same.

By the provisions of the decree the court retained jurisdiction (292) of the cause for the purpose of making reasonable rules touching the manner of diverting, measuring and distributing the waters and devices to be installed and used for such purposes, and for the purpose of directing that the parties keep accurate and detailed records of the amounts of water diverted, and to require reports to be filed from time to time of the amounts so diverted, and to appoint commissioners or water masters to make distribution in accordance with the terms of the decree.

The decree also specifically describes, by legal subdivisions, the particular tracts of land in the State of Nevada, upon which the defendants would be permitted to use the waters awarded to them in the decree.

The following is a general statement of points involved in this appeal and raised by the assignment of errors herein:

1. The bill should have been dismissed as to the defendant, The Utah Construction Company.

2. The decree erroneously awarded plaintiffs water rights under alleged grants from private individuals who, it was claimed, had appropriated said waters long prior to the organization of the plaintiff companies. This statement refers to all of the waters decreed to plaintiffs with the exception of the rights acquired under the applications filed by or in behalf of plaintiffs on the 27th day of March, 1908, and the 10th day of March, 1909, respectively. Appellants also insist that even if the Court did not err in awarding plaintiffs these rights, or some of them, it did err, nevertheless, with respect to the quantities of water awarded plaintiffs and with respect to some of the dates of priorities given to those rights by the decree.

3. The decree is erroneous with respect to the quantities and priorities adopted by the Court in defining the vested rights of the defendant, Vineyard Land and Stock Company. This point involves the finding of the Court with respect to the duty of water on defendants' lands. That is to say, the Court found the duty of said water to be two acre feet for pasture and three acre feet for hay and grain land, whereas the great weight of the evidence is to the effect that the duty of water for the pasture and hay land is not less than four acre feet per acre.

4. The Court erroneously attempted by its decree to exercise jurisdiction over the property of the defendant, Vineyard Land and Stock Company, in the State of Nevada, and to regulate and control the internal affairs of said defendant in said state. Among other things, the decree erroneously provides that the waters awarded to the defendants could be used only upon certain described tracts of land in the State of Nevada; that said waters could be diverted from the natural channel only through ditches and canals "so constructed that water can be accurately measured;" that the defendants would not be permitted to irrigate their lands by means of the methods used by them and their predecessors in interest in the past; that is to say, by placing dams in the channel of the stream and in swails and sloughs leading therefrom and thereby causing certain of said lands to be flooded without the use of artificial ditches; that the defendants should place in all of the ditches and channels used by them for the purpose of diverting water onto their said lands,

"uniform measuring devices at their several points of diversion along the stream and its tributaries, all of such devices to be of such design as to automatically register the amounts of water diverted;"

that all of such measuring devices and guages should at all times be subject to the inspection of plaintiffs and that plaintiffs should have access to the premises of the defendants in the State of Nevada for the purpose of inspecting said devices; in other words, it was provided that the officers, agents and employees

of the plaintiffs were to have the right (in effect an easement) to go upon and over the lands of the defendants in the State of Nevada for the purposes mentioned.

The Court also erroneously attempted to prescribe the sizes of irrigation streams that the defendants might use at their several ranches for the irrigation thereof.

5. It was erroneously provided in the decree that the Court should retain jurisdiction of the cause for the purpose of making reasonable rules touching the manner of diverting, measuring and distributing the waters and of regulating the devices to be installed for that purpose, as well as of directing the defendants to keep accurate and detailed records of the amounts of water diverted and used by them, and to file reports thereof from time to time; also to enable the Court to appoint commissioners or water masters to go upon defendants' lands (in Nevada) for the purpose of making distribution of the waters according to the terms of the decree.

SPECIFICATION OF ERRORS RELIED UPON.

The assignment of errors by which the points above referred to are raised on this appeal are as follows:

I.

“The Court erred in decreeing to plaintiffs any of the waters of said Goose Creek and its tributaries, with the exception of such said waters, to-wit, about 30,000 acre feet thereof, as plain-

tiffs are entitled to under permits issued by the State Engineer of the State of Idaho, being respectively, permit number 3751, dated March 27, 1908, and permit number 4731, dated March 10, 1909. (294-95.)

II.

“Even if the Court did not err in decreeing to plaintiffs water rights in said streams other than those to which plaintiffs are entitled under said permits No. 3751 and No. 4731, respectively, the Court erred nevertheless in decreeing to plaintiffs water from said streams, other than as follows:

450 acre feet dating from May 1st, 1878;
150 acre feet dating from May 1st, 1879;
300 acre feet dating from May 1st, 1881;
1350 acre feet dating from May 1st, 1883;
6755 acre feet dating from May 1st, 1888; and
21025 acre feet under said permits No. 3751
and No. 4731. (295.)

III.

“The Court erred in making and entering said decree, in awarding and decreeing to plaintiffs the right to the use of any of the waters of said Goose Creek and its tributaries as a prior right to the rights of the defendant Vineyard Land and Stock Company in and to said waters. (295.)

IV.

“The Court erred in making and entering said decree, in not holding that the defendant Vineyard Land and Stock Company had the following rights to the use of the waters of said streams:

400.0 acre feet, dating from the year 1875;
1018.4 acre feet, dating from May 1st, 1883;
962.0 acre feet, dating from May 1st, 1886;
15.6 acre feet, dating from May 1st, 1888;
393.6 acre feet, dating from May 1st, 1889;
and
1418.4 acre feet, dating from various dates between the year 1890 and January 1st, 1906. (295-296.)

V.

“The Court erred in making and entering said decree in enjoining the defendant Vineyard Land and Stock Company from using the waters of said streams to which it is entitled upon the lands of said defendant susceptible of irrigation from the waters of said streams other than the lands specifically mentioned and described in said decree. (296.)

VI.

“The Court erred in limiting and restricting the defendant Vineyard Land and Stock Company with reference to the sizes of irrigation streams to be used by it in the irrigation of its

lands in the State of Nevada from the waters of said Goose Creek and its tributaries. (296.)

VII.

“The Court erred in decreeing absolutely to the plaintiffs any of the waters of Goose Creek and its tributaries in excess of the quantity, to-wit, about 30,000 acre feet, which has been used by plaintiffs for beneficial purposes, and in enjoining the defendant Vineyard Land and Stock Company from using any of such excess waters prior to the actual application of the same by plaintiffs to the beneficial uses for which said waters are claimed; and in making and entering any decree herein with respect to such excess waters, except to determine the amount thereof that can be diverted through plaintiffs’ works, and the priority of the same, and to set a time within which such amount of such excess shall, subject to the rights of the defendant, be applied by plaintiffs to the purposes for which same is claimed. (297.)

VIII.

“The Court erred in making and entering its decree herein enjoining the defendant Vineyard Land and Stock Company from changing the points of diversion and places of use of the waters of said Goose Creek and its tributaries, in the State of Nevada, as authorized by the laws of said State. (297.)

IX.

“The Court erred in making and entering its decree herein enjoining the defendant Vineyard Land and Stock Company from irrigating its lands in the State of Nevada by means of dams placed in the natural channels of said Goose Creek and its tributaries, and in sloughs and other channels leading therefrom, thereby flooding said lands without the use of artificial canals, ditches and conduits, and in enjoining the defendant Vineyard Land and Stock Company from diverting any of the waters of said stream or its tributaries, except by means of ditches or other devices provided with automatic guages. (297.)

X.

“The Court erred in making and entering its decree herein requiring the defendant Vineyard Land and Stock Company to install in all of its ditches, canals and conduits, in the State of Nevada, automatic measuring devices for measuring all waters used by the said defendant from said streams, in said state, and in decreeing that all such measuring devices and guages shall at all times be subject to the inspection of plaintiffs; and in decreeing that plaintiffs should have the right to go upon the lands of said defendant in the State of Nevada for the purpose of inspecting the measuring devices installed by defendant in its said ditches, canals and other conduits. (298.)

XI.

“The Court erred in making and entering its decree herein in retaining jurisdiction for the purpose of making rules touching the manner of diverting, measuring and distributing said waters, or for the purpose of making rules concerning the devices to be installed and used for diverting, measuring and distributing said waters, or for the purpose of directing the defendants to keep records of the amounts of water diverted by said Vineyard Land and Stock Company, or for the purpose of requiring defendants, or either of them, to make or file reports concerning the amounts of water diverted, or for the purpose of appointing commissioners or watermasters to make distribution of said waters, or for the purpose of making any order whatever touching the distribution, points of diversion, places of use, or methods of irrigation, in the use of said waters by the defendant Vineyard Land and Stock Company in connection with the irrigation of its lands in the State of Nevada. (298.)

XII.

“In addition to the foregoing, The Utah Construction Company assigns as error, that the Court erred in making and entering the decree herein as to it, and in not dismissing the bill of complaint as to said defendant.” (299.)

BRIEF OF THE ARGUMENT.

The Court Erred in Granting Plaintiffs Any Relief as Against the Defendant, The Utah Construction Company, and in Not Dismissing the Bill as to Said Defendant.

Although this point is raised by the twelfth and last assignment of error, it can quite properly be disposed of first. It will be noted by referring to the bill that no allegation was made charging the defendant, The Utah Construction Company, with having constructed any canals or ditches for irrigation purposes, or with having used any of the waters of said streams for such purposes. It is alleged that "said defendant" was the owner of lands in the State of Nevada, but not that any of such lands were irrigated from the waters of Goose Creek. It is alleged that "said defendant" was the owner of nearly all of the capital stock of the defendant, Vineyard Land and Stock Company, and that it directed and controlled the operations of said Vineyard Company. It was admitted in the answer that the defendant, The Utah Construction Company, was the owner of certain lands in the State of Nevada; that it owned nearly all of the capital stock of the Vineyard Company; but it was denied that the operations of the Vineyard Company were directed or controlled by The Utah Construction Company. In the affirmative allegations of the answer it was not alleged that The Utah Construction Company claimed any right whatever in or to the waters of Goose Creek or the tributaries thereof. On the contrary, it was alleged that the defendant, Vineyard Land and Stock Com-

pany, was the owner of all of the irrigated lands in the State of Nevada in any manner involved in the suit and was the sole claimant of the waters used for the irrigation of those lands. The only thing introduced at the trial upon any issue involving The Utah Construction Company in any way consisted of a stipulation (67) between counsel to the effect that The Utah Construction Company was the owner of a large portion of the capital stock of the Vineyard Company and that such ownership constitutes the only relationship that exists between the two companies. No attempt was made by plaintiffs to prove either that the defendant, The Utah Construction Company, had used, or threatened to use, any of said waters, or that it had ever attempted to direct or control the operations of the Vineyard Company.

It would seem, therefore, that a bare statement of the facts is all that is necessary in support of this assignment.

Pittsburgh etc. Co. v. Duncan, 232 Fed. 586.

Appellants' First and Second Assignment of Errors.

These assignments raise the question as to the correctness of the decree with respect to the water rights awarded to plaintiff under grants from private individuals. These are the rights mentioned in paragraph (a) of the decree, as follows:

- 825 acre feet under date of May 1st, 1878;
- 275 acre feet under date of May 1st, 1879;
- 687.5 acre feet under date of May 1st, 1880;
- 2337.5 acre feet under date of May 1st, 1882;

1375 acre feet under date of May 1st, 1883;
8250 acre feet under date of May 1st, 1884;
4125 acre feet under date of May 1st, 1888.

The assignments with respect to the provisions of the decree granting these rights are as follows:

I.

“The Court erred in decreeing to plaintiffs any of the waters of said Goose Creek and its tributaries, with the exception of such of said waters, to-wit, about 30,000 acre feet thereof, as plaintiffs are entitled to under permits issued by the State Engineer of the State of Idaho, being respectively, permit number 3751, dated March 27, 1908, and permit number 4731, dated March 10, 1909. (295-296.)

II.

“Even if the Court did not err in decreeing to plaintiffs water rights in said streams other than those to which plaintiffs are entitled under said permits No. 3751 and No. 4731, respectively, the Court erred nevertheless in decreeing to plaintiffs water from said streams, other than as follows:

450 acre feet dating from May 1st, 1878;
150 acre feet dating from May 1st, 1879;
300 acre feet dating from May 1st, 1881;
1350 acre feet dating from May 1st, 1883;
6755 acre feet dating from May 1st, 1888; and
21025 acre feet under said permits No. 3751 and No. 4731.” (295.)

Plaintiffs claim rights under purchase from former appropriators of waters aggregating three hundred second feet. From the nature of the proof offered by them in support of the allegations of the bill with respect to these rights it will be seen that if they were the owners in fact of any of these early rights they acquired the same under deeds from individual grantors. The necessities of the case were such, therefore, that it was incumbent upon plaintiffs to prove, first, the existence of each of said rights; and, second, a conveyance thereof to plaintiffs. It is submitted that the proof utterly fails to come up to these requirements. We set forth below everything appearing in the record with relation to these so-called early rights.

Plaintiffs' witness, Sol Worthington, testified:

I am a farmer and merchant and have resided at Oakley, Idaho, for thirty years. I am familiar with the negotiations which led up to the construction of the Oakley irrigation project, and particularly the negotiations with settlers owning lands and old water rights under that project. I was chairman of the committee chosen by the people to negotiate the merger. The committee was formed in 1909, prior to the (72) making of the contract with the State for the construction of the works.

MR. HAYS: Please state precisely what that committee did in order to bring about the arrangement.

MR. NEBEKER: We object, if the Court please, as immaterial and irrelevant, and on the further

ground that it appears that the contracts were entered into which consummated these negotiations inquired about here, and those contracts constitute the best evidence.

MR. HAYS: This is just leading up to that arrangement.

THE COURT: I think I will let him state very briefly what was done, and then you can go into details—upon the suggestion that it is preliminary only. It can't be of any substantive value. You may proceed, Mr. Worthington, and state briefly.

MR. WORTHINGTON (continuing):

The committee's labor was to ascertain the amount of land that they had in actual cultivation and the purpose was to acquire an exchange from the reservoir of sufficient water to irrigate the lands that we had already under actual cultivation. We ascertained the area of the patented lands, as well as all lands under cultivation. There were 6,500 acres of cultivated lands and approximately 12,000 acres of patented lands. On Plaintiffs' Exhibit No. 6 the 12,000 acres of patented land is represented by those blocks having diagonals. Plaintiffs' Exhibit No. 5-c is the form of contract entered into with the people who had irrigated lands on the Oakley project. Contracts were issued in the form of 5-c at \$40.00 per acre. (73.) The people owning water entered into an agreement to transfer their rights to the Twin Falls Oakley Land and Water Company in the form of Plaintiffs' Exhibit 8. (74.)

Plaintiffs thereupon offered in evidence Plain-

tiffs' Exhibit No. 8, to which offer defendants objected as immaterial and irrelevant, and so far as it purports to show the conveyance of any water rights or agreement to convey any water rights to plaintiffs, on the ground that it is not the best evidence.

MR. NEBEKER: You don't contend that by this contract any water rights was conveyed to the company.

MR. HAYS: We will take that up later, but it was under this form. Of course, this does not convey anything; this is simply a blank form, but it was under these forms that conveyances were made later. We will furnish you a list, as I suppose it was understood, showing these conveyances.

MR NEBEKER: That is correct. Then we will withdraw the latter part of the objection, the part as to its not being the best evidence.

A certain document was thereupon marked: *Plaintiffs' Exhibit No. 8.*

THE COURT: Overruled; it may go in.

MR. WORTHINGTON (continuing):

That agreement was followed by conveyances of the water rights, in the form of Plaintiffs' Exhibit No. 9.

This exhibit was thereupon offered in evidence over the objection of defendants that the same was immaterial and irrelevant. (74.)

A certain document was thereupon marked: *Plaintiffs' Exhibit No. 9.*

MR. WORTHINGTON (continuing):

The people on what may be called the old lands,

indicated on Plaintiffs' Exhibit No. 6 by the diagonal white lines, obtain water at present from the Goose Creek Reservoir under the terms of these forms of contract. (75.)

Plaintiffs' witness, Benjamin Howells (75), testified:

I have resided at Oakley, Idaho, for thirty years. I am a practicing attorney there and ranching some. I have some knowledge of the negotiations relating to the transfer of what might be called the old water rights. Most of those deeds and contracts were made and signed in my office. Prior to that time the waters of Goose Creek were handled by a water master under a decree of the District Court of our county. The decree in the case of Martin Okelbery, H. M. Thatcher, et al., against C. H. Karlson and others, in the District Court of the Third Judicial District of the Territory of Idaho, in and for Cassia County, and dated the 10th day of September, 1886, was the first of these decrees for the waters of Goose Creek. The decree in the case of Mary H. Botzet against George Chapin, and others, in the same Court, dated the 19th day of March, 1892, was the second decree.

MR. HAYS: We offer in evidence certified copies of those decrees. The defendants in this case were not parties to those decrees. (75.)

Q. (By Mr. Hays.) I will ask you one further question, Mr. Howells. Were all or substantially all of the water users from Goose Creek, in what might be called the Oakley district, that is, from the present

site of the dam of the company northward, parties to this suit, the last one?

A. The last suit, I think, most of the water users were parties to the last decree, the last suit.

MR. NEBEKER: Just a moment. I move to strike out the statement of the witness that the parties to this suit were water owners, on the ground that it is giving a conclusion of the witness.

MR. HAYS: Well, water users, then.

THE COURT: You mean by owners the water claimants?

A. Yes, sir; claimants.

MR. HAYS: Q. You also mean the people who actually used the water, Mr. Howells?

A. Yes, so far as I know.

MR. NEBEKER: We move to strike that out, if the Court please, as not the best evidence, and giving the conclusion of the witness.

MR. HAYS: If the Court please, that is not necessarily an opinion.

THE COURT: I think I will let it stand.

MR. NEBEKER: All that I desire, if the Court please, at the present time is that the record will not be bound by the statement of Mr. Howells here as to the establishment of these rights. I don't desire to delay the putting in of this testimony so long as it isn't claimed— (76.)

THE COURT: The only purpose of this testimony, as I understand, is to get the information that most of the persons who claimed or used waters from the stream were parties to this suit.

MR. HAYS: That is true.

THE COURT: Of course, the matter of use is a question of fact. Now, if he knows there were not many other users or claimants, he may so state.

MR. NEBEKER: I think the negative of it may perhaps be competent, but for him to testify that these persons who were parties to this decree were water users might raise the presumption and make a *prima facie* case of ownership, and I don't know whether it is the intention to put it in for that purpose.

THE COURT: It won't go very far, of course, in establishing a right, of course, because he doesn't indicate the amount they used or when they began to use it, or the method of use.

MR. HAYS: Q. Were you generally familiar with conditions there?

A. At the time of these decrees?

Q. Yes.

A. Yes, I was more or less acquainted with the conditions.

MR. HAYS: I now offer in evidence the decrees mentioned.

Said document was thereupon marked: *Plaintiffs' Exhibit No. 10.*

MR. NEBEKER: These are objected to as immaterial and irrelevant, if the Court please, and on the further ground that it is not shown that any of (77) the parties mentioned in the decrees were the owners of any water rights at the time the decree was rendered, and particularly as to being irrelevant and immaterial as to either of these defendants, for the

reason that they were not parties to this action. The objection—

THE COURT: Are there two exhibits, 10 and 11?

MR. HAYS: No, they are bound together under one cover.

MR. NEBEKER: The objection goes to Exhibit 10, including both decrees.

THE COURT: I am not sure that I understand the nature of your objection, Mr. Nebeker. I am inclined to think the decrees are both relevant and material. Whether or not they will be competent against your client is another question. They relate to a very material matter.

MR. NEBEKER: Our objection goes to the point that they would be, I take it, immaterial and irrelevant as to us until it is shown that the parties to that suit, that is, shown as to us that the parties to that suit were the owners of water rights. That is what I had in mind in making the objection. I don't object to the fact that the original decrees are not presented here.

MR. HAYS: Or the pleadings, I presume?

MR. NEBEKER: Or the pleadings. We do object to these exhibits, and each of them, as to their competency as to us in all respects except that we do not object to them on that ground, as being certified copies instead of the original decree, and the (78) pleadings upon which the decrees were taken, if the Court please.

THE COURT: Upon what theory can I receive them upon this objection?

MR. HAYS: If the Court please, they are necessarily a part of our title. We obtained the ownership of these various water rights, and we obtained them through the medium—from the parties or their assigns who were parties to this suit and this decree. We will have to follow it up later with other proof, as I take it.

THE COURT: You mean you simply offer them for the purpose of identifying the descriptions in your deeds?

MR. HAYS: No, we do not do that, if the Court please. We offer this as a part of the history of the transaction through which we obtained our water rights, and as a part of our chain of title. I do not understand that they object to any informality on the part—so far as not having the pleadings here, or the findings, or anything of that sort.

THE COURT: What I am trying to get at is, whether or not you claim the decree is proof of your water right which you now claim as against the defendant company.

MR. HAYS: Possibly it might not be, but we have to show through what source we obtained our rights.

THE COURT: Suppose there had never been any decrees?

MR. HAYS: Then we would have to show the facts from the users of water. (79.)

THE COURT: That is what I am trying to get at. Now, do you contend that with the decrees in you will not have to show the facts.

MR. HAYS: No, I don't claim that. I will still

have to show other facts as well. This decree, of course, wouldn't bind the other parties.

THE COURT: With that admission, the decrees I think may go in. I hardly see how they will serve any useful purpose, however, other than the identification of the description in your deeds, if reference is made to the decrees, as I infer it is from these forms you have offered in evidence.

MR. HAYS: Yes.

THE COURT: But if they are not evidence of the appropriation of water then they are not evidence of any right.

MR. HAYS: If we later prove that they had some right or cultivated some land, then the title may go through, perhaps. If we fail to do so conditions might be different.

MR. NEBEKER: Then do I understand, if the Court please, that they are not offered as substantive proof of the existence of any water rights in the parties to the suits in which those decrees were entered, or any ownership?

MR. HAYS: They are only offered as a part of our chain of title, which we propose to take up, but you were not parties to that suit. Therefore, as we understand it, you would not be bound by that decree.

MR. NEBEKER: And you don't claim that they constitute any evidence of ownership of water in the parties to the decree? (80.)

MR. HAYS: That may or may not be. That may or may not be, as will hereafter appear. It is just simply one person has a deed to a piece of land. I

can't offer only one deed at a time. I have to follow my chain of title down. I don't exactly understand—

THE COURT: I think Mr. Hays has a different conception of the function of the decree from what I had in mind. You seem to regard it as one link in the chain of title. I don't understand how a water decree can be a link in a chain of title. A decree does not confer anything upon the person to whom the decree goes that he didn't already have, presumably. It simply confirms in him a right which he claims already to have.

MR. HAYS: And it may fix, as between him and the other parties to the decree, the amounts.

THE COURT: It would of course as to the other parties, that is true.

MR. HAYS: It is in that, if the Court please, as I understand it, that it may become a chain of title.

THE COURT: I think I will let the exhibit go in, upon the express statement of Mr. Hays that he does not claim that this is binding in any way upon the defendant companies. So far as they are concerned at least, you will have to show the existence of a water right the same as if a decree had never been entered, so I think with that understanding you may proceed, and no one will be misled.

Mr. Howells (continuing):

Plaintiffs' Exhibit No. 11 appears to me to be an itemized list of the parties signing the deeds and (81) the several different inches or dates of water which the people were conveying to the company.

Plaintiffs thereupon introduced in evidence

Plaintiffs' Exhibit No. 11, for the purpose only, as stated by counsel for plaintiffs, as showing a summary of all deeds made by claimants of the waters of Goose Creek to the company, and for the purpose of showing that said deeds conveyed to the company only such waters as were owned by the claimants at the time the deeds were made.

Mr. Howells (continuing): Under the decree there was a conveyance of so much Thatcher water, as they called it, and so much Chapin water and so on, and Plaintiffs' Exhibit No. 11 shows the list of conveyances purporting to be made under the decree. Plaintiffs' Exhibit No. 12 is a map showing the patented lands, or old irrigated lands, in the Goose Creek Valley at the time of the organization of the new project in 1909. I think I can designate on this map the ditches then existing in the Oakley district. The points of diversion and the names were as follows: The point of diversion of the two main canals or laterals is shown in the lower part of Plaintiffs' Exhibit 12; the one running to the right or east is known as the east canal, and the one running to the left or west is known as the west canal. The Hopkins or Haywood ditch is the second ditch on the east side and lower down. It runs through section 8, township 14 south, range 22. The second ditch on the west side of Goose Creek and lower down is the Worthington-Sevier and Cummins ditch, running (82) down through to irrigate a portion of section 8, same township and range. Then the next ditch I notice on the map and having its source east of Goose Creek and

further down, or north, is the Keplinger & Birch ditch, known in the early days there and mentioned in the decree. The next ditch I notice on the map further down on the west side of Goose Creek, and mentioned in the decree, is the Ferguson & McBride ditch. Further on down on the east side is what is known as the Tolman & Whittle ditch mentioned in the decree. Further down on the west side is what is known as the Wells ditch mentioned in the decree. Pretty well below the center of the old lands there is a dam and ditch running from the west side of the creek known as the Tolman ditch mentioned in the decree. Further on down the project and on the west side again is what is known as the Green & Homer ditch mentioned in the decree. I made a mistake as to the Wells ditch. It is further on north, running out of the east channel of Goose Creek after it spreads or forks, down near the center of the old irrigated project, and goes into what we call the island in between the two streams. The last ditch taken out is the Carson-Copper ditch. The early rights, or those which are dated furthest back in the decree mentioned, is on down some eight or ten miles below these last ditches, in township 11, range 22. They are known as the Thatcher ditch, Chapin ditch, Dunn ditch, Botzet ditch, and those names of parties mentioned in the decree. The Tinkrel ditch was further on down. It was taken out of Goose Creek (83) just a short distance above where the present town of Burley is situated.

Q. * * * What, if you know, Mr. Howells, what

was done by the people up in the vicinity of Oakley towards acquiring the rights of those people that were further north?

MR. NEBEKER: That is objected to as calling for a conclusion, and immaterial and irrelevant and incompetent.

MR. HAYS: Mr. Nebeker, that would, of course, involve only a conveyance between our own people, and I presume would not affect your rights.

MR. NEBEKER: If it isn't offered for the purpose of showing that any water rights existed—

MR. HAYS: Not at the present time.

MR. NEBEKER: —in the persons to whom you refer, I have no objection.

MR. HAYS: Not at the present time. My purpose is this, to show that the people up around Oakley purchased from the people further north their rights, and used whatever rights they had up in the vicinity of Oakley, and distributed them among themselves.

MR. NEBEKER: Whatever rights they had?

MR. HAYS: Whatever rights they had.

MR. NEBEKER: If any.

MR. HAYS: Yes. Later on we will show what those right were, possibly.

Mr. Howells (continuing): As I remember, in the spring of 1889 H. C. Haight, now dead, negotiated a deal for the Thatcher water, which was then being (84) used away down the valley at the lower end of the settlement, and brought the water up to Oakley settlement and distributed it, half an inch, or an inch,

or an inch and a half, to the people who lived in the vicinity of Oakley, for the purpose of saving the trees and gardens.

MR. HAYS: This is just part, Mr. Nebeker, of the history of the locality.

MR. NEBEKER: You don't claim that it has any tendency to prove title?

MR. HAYS: Not until later. We hope to claim it later. We hope to make our claim through these rights.

MR. BOYD: In other words, you expect to establish the Thatcher rights later?

MR. HAYS: Yes. I am simply trying to avoid the introduction of a large mass of documentary evidence, and things of that sort.

MR. HAYS: Q. Were any of the other rights further north purchased?

A. Well, not in the vicinity of the Thatcher water.

MR. NEBEKER: If the Court please, I don't want to obstruct the trial of this case in any way; I would like to expedite it. I don't ask that this documentary evidence shall be produced here, but these questions all involve the assumption that there were water rights, and I fear that we will soon have the record charged with testimony of that character in such a way that it will be difficult for us to ascertain if some proof has not been made in this way of the existence of rights. (85.)

THE COURT: Counsel has expressly disclaimed that and of course he will be held to his disclaimer.

MR. NEBEKER: Well, with that understanding, I have no objection.

(Last question read.)

A. Yes, in the vicinity of where the Thatcher water was used. Mr. Howells (continuing): A short time after the Thatcher water was purchased by Mr. Haight, parties made arrangements and bought the Chapin water, a good deal in the same manner, and divided it among the several people up the valley in the vicinity of Oakley, Marion and Island, little settlements shown upon the map. The Tatro claim was purchased and distributed in the same way and the Dunn water and the Botzet water as mentioned in the decree. All of the water mentioned in the decree that was formerly claimed at the lower end of the valley was purchased by different parties and moved up the valley in the vicinity of Oakley and Marion.

MR. HAYS: Mr. Nebeker, as I understand it, our stipulation is to this effect, that we are the successors in interest of whatever rights those people had under that decree?

MR. NEBEKER: That is my understanding; General, yes.

MR. HAYS: So that we may confine our proof to the rights themselves?

MR. NEBEKER: To the rights themselves.

MR. BOYD: In other words, that we are the owners of whatever rights we have on our side, and that (86) you are the owners of whatever rights these people may have had on your side.

Mr. Howells (continuing): I first went to the vicinity where Oakley now is in 1878. I was there in 1880-81 and 88. In 1888 I attempted to distribute the waters as water master of Goose Creek. It was the driest season I have seen in that country. My duties took me over the various ditches. As far as I remember the ditches shown on Plaintiffs' Exhibit No. 12 were in existence at that time. The first decree on Goose Creek was in 1886. In 1888 I distributed the waters on Goose Creek over most all of the country shown in green on Plaintiffs' Exhibit 12. I would approximate the acreage at 6,000 to 6,500 acres; perhaps not all irrigated that year, but as much as could be with the supply of water we had. The supply was very scarce and was not sufficient to cover the entire area. All of the flow of Goose Creek was diverted at the points shown in Plaintiffs' Exhibit 12. I think every ditch was used more or less that season. I believe in 1878 there was 300 acres farmed in the vicinity of Oakley and on north down the valley at what was known as the Thatcher place. In 1879 the acreage was, I think, probably 400 acres. In 1880 it was increased; people were coming into the country and developing it, in small tracts at first and then increasing, and along as the settlement grew older more people came in. The chief influx of population was in 1881 and 1882. Up to the time of the influx of people in 1881, there would probably be six or seven hundred acres in cultivation.

The location and capacity of the ditches were vir-

tually the same in 1909 as in 1888. There was very little change in the area of irrigated land between the two years. The irrigation of the 6,500 acres was about the same between 1888 and 1909 and down to the present time. The waters of Goose Creek and its tributaries were used by these farmers from year to year. In 1888 and subsequent years many of the ditches were able to carry much more water than we had for them. The conveyance to the Twin Falls Oakley Land and Water Company purported to convey 8,890 some odd inches, as I remember it. That is substantially what the totals would be from that blue print. There was about 6500 acres effectively cultivated. I cannot say what the difference between 6,500 and 8,890 inches represented, other than perhaps the 8,890 odd inches of decreed water indicated that the parties making the deal thought some of the water was of little value by reason of it being only flood water or high water. Prior to the construction of the reservoir system the people began irrigation as soon as possible in order to get their hay lands, alfalfa lands, and so on, irrigated up as early as possible in the spring. (88.)

The decrees referred to in the foregoing proceedings were introduced in evidence as Plaintiffs' Exhibit No. 10. (259-275.)

It is not claimed that either of the defendants was a party to the suits in which these decrees were rendered and, therefore, the decrees do not constitute evidence of title in this suit. Plaintiffs did not attempt to establish title in a single one of the alleged

grantors. There is in the record a list of names of individuals who, ostensibly, had conveyed water rights to the plaintiffs, but there is not a scintilla of evidence tending to prove that either of said grantors at the time the respective conveyances were executed, or for that matter, at any other time, had any title to convey. It seems to have been conceived by plaintiffs that the existence of water rights in the individuals who made deeds to them was established by the decrees offered and received over the objection of the defendants, although the Court ruled upon the matter on several different occasions and made it entirely clear that the decree should not be regarded as substantive proof of the water rights mentioned therein. It was obviously incumbent upon plaintiff to prove all the facts necessary to establish that each and every grantor was the owner at the time of conveyance of the right mentioned in the deed. It did not suffice for them to show that at some indeterminate time in the past certain unnamed and unidentified persons had diverted and used from the waters of Goose Creek a sufficient quantity of water for the irrigation of a tract of 6,500 acres as claimed by plaintiffs. Who were these individuals? Were they the same persons whose names appear in the decrees or in the deeds to plaintiffs? We submit that it was not shown that a single individual named in the list of plaintiffs' grantors ever had any water rights to convey.

If it be true that plaintiffs failed to show title as to the so-called old rights then it must follow that they are foreclosed from claiming any part of this

300 second feet of the waters of Goose Creek under their alleged appropriation; for, if this water had been appropriated as by formal allegation in their bill they say it was, it was not public water and therefore not subject to appropriation at the time they filed their application with the state engineer of Idaho.

It will be noted that the question as to the so-called early rights is stated in the alternative. We will briefly explain our position with reference to the point raised in the second or alternative assignment of error.

Assuming that the Court did not err in the particulars we have just been discussing, it did err, we think, as to the quantities of water granted under the so-called old rights, and also erred with respect to the dates thereof. First, let us see what the evidence is concerning the dates when it is supposed that these water rights were acquired. There is sufficient testimony to support the findings that there were three hundred acres under cultivation in 1878; that there was an additional one hundred acres under cultivation in 1879; also an additional two hundred acres in 1881 (87); possibly an additional nine hundred acres in 1882 or 1883 (89); and approximately an additional 5,000 acres in 1888. (87.) However, we find no evidence in the record justifying the finding that there was any appropriation in the year 1880, or in both the years of 1882 and 1883, or in the year 1884. The two witnesses for the plaintiffs who testified with respect to this early irrigation, were Mr. Benjamin

Howells (75), and C. J. Parkinson. (88.) Mr. Howells testified (87), that he entered the vicinity of Oakley in 1878; that in 1888 he distributed the waters of Goose Creek for the irrigation of approximately 6,000 to 6,500 acres, although it was not all irrigated in that year on account of the scarcity of the supply. That in 1878 there was 300 acres; that in 1879 there was probably 400 acres; that it was increased in 1880 but did not say how much; that the people were coming into the country and developing it in small tracts; that the first influx of population was in 1881 or 1882; that "up to the time of the influx of people in 1881 there would probably be six or seven hundred acres in cultivation." That the irrigation of the 6,500 acres was about the same in 1888 as at the present time. (88.)

The witness Parkinson testified that he went to Oakley in 1882; that in 1882 and 1883 he would judge there was possibly 1500 to 2000 acres under cultivation; that there was not much difference in the ditches and old claims between 1882 and 1883 up to 1900.

Under the most favorable construction that could be placed upon the testimony, the appropriations occurred respectively in 1878, 1879, 1881, 1882 or 1883, and 1888, and the areas irrigated in those years would be as above stated by the plaintiffs' witnesses, instead of the areas found by the Court and stated in the decision. (278-9.) This brings us to a consideration of the duty of water for these lands.

The Court says in its written decision (283): "Upon consideration of the entire record I have con-

cluded to allow the plaintiff at the rate of $2\frac{3}{4}$ acre feet per acre." This duty applied to the acreage found by the Court gives the quantities awarded to plaintiffs under these so-called old rights, as stated in paragraph (a) of the decree. (285.) But there was no evidence offered from which the Court could properly conclude that a duty of water of $2\frac{3}{4}$ acre feet per acre would reasonably be required for the irrigation of these lands. On the contrary, plaintiffs only claimed a duty of one and one-half acre feet per acre. The State contract required plaintiff to furnish settlers only that quantity, and it was formally stipulated (88) "that the Oakley lands were originally arid in character and that they require one and one-half acre feet as provided for in the State and Settlers' contracts for their proper irrigation." Applying a duty of one and one-half acre feet to the acreages shown by the evidence, it will be noted that the plaintiffs' rights under prior grants should not exceed those stated above in the second assignment of error.

The Court Erred With Respect to the Quantities of Water Awarded to Defendant, Vineyard Land and Stock Company, and with Respect to the Dates to which Said Rights Relate.

The fourth assignment of error is as follows:

"The Court erred in making and entering said decree, in not holding that the defendant, Vineyard Land and Stock Company, had the following rights to the use of the waters of said streams:

400.0 acre feet, dating from the year 1875;
1018.4 acre feet, dating from May 1st, 1883;
962.0 acre feet, dating from May 1st, 1886;
15.6 acre feet, dating from May 1st, 1888;
393.6 acre feet, dating from May 1st, 1889; and
1418.4 acre feet, dating from various dates between the year 1890 and January 1st, 1906.”

The decree awards to the defendants rights aggregating 1935 acre feet per annum. It will be seen at once that these rights are of relatively little consequence. Eight hundred thirty-five acre feet of the water involved in these rights is made subsequent and inferior to rights awarded to plaintiffs, aggregating 17,875 acre feet. Even if all of the rights granted to the defendants were prior to the rights granted to plaintiffs, thus insuring a supply of water to satisfy the defendant's rights, there would still be only a sufficient quantity of water to irrigate properly about 500 acres of the defendant's lands according to the customary mode of irrigation in that section of the country. There is only about one-third as much water as would be reasonably required for the irrigation of those lands of the defendant that, according to the Court's finding, were irrigated long before either of the plaintiff companies was organized. The Court found (280) that defendants had acquired water rights for the acreages and under the dates following:

On the Winecup Ranch, 100 acres of pasture or meadow land from May 1st, 1875; 125 acres of

meadow or pasture land from May 1st, 1886; 100 acres of meadow or pasture land from May 1st, 1900.

On the Grande Ranch, 250 acres of pasture or meadow land from May 1st, 1883; 50 acres of hay land, May 1st, 1883; 50 acres of hay land, May 1st, 1889; 100 acres of pasture land, May 1st, 1900.

Spring Creek Ranch, 10 acres of alfalfa, 35 acres of wild hay land; and 75 acres of pasture land, as of May 1st, 1904.

This total of 895 acres is to be irrigated with 1935 acre feet of water; this is about two and one-eighth acre feet per acre. But only a part of this 1935 acre feet is awarded to defendant as a primary right. For that reason there is no assurance that this quantity of water will always be available for irrigation.

The 895 acres of land which the Court found was irrigated by the defendants prior to the date of filing plaintiffs' first application does not quite include all the lands that were shown to have been under irrigation prior to that date. In the testimony of Mr. Way (125) it appears, by taking the acreages given by him, that there were 1052 acres under the old irrigation. It will also be noted from Mr. Way's testimony, when considered in connection with defendants' Exhibits No. 3 and No. 4, that since the year 1908 the Vineyard Company has taken out canals and ditches and has brought under cultivation several thousands of acres of land along Goose Creek and its tributaries. The Court disallowed defendants' claims on account of this development and it

may be conceded that the only basis upon which such claims can rest is that the defendant, Vineyard Company, is entitled to avail itself of the principle of a just and equitable division of the waters of Goose Creek as between the appropriators in Nevada on the one hand and the appropriators in Idaho on the other.

Kansas v. Colorado, 206 U. S. 117.

But passing that question for the time being and returning to the subject of the rights of the Vineyard Company that were recognized by the Court in its decree, it is submitted that the Court erred with respect to certain of the dates of those rights and more particularly with respect to the duty of water as applied to the irrigation of the lands of the Vineyard Company.

For the year 1886 the Court awarded a right for 125 acres on the Winecup Ranch, but did not award any additional acreage for the Rancho Grande. In that year, according to undisputed evidence, a ditch was constructed that brought under irrigation all of that part of Section 35 on the Grande Ranch lying on the east side of the channel (102) with the exception of the small area that had been irrigated from the dams placed in the natural channel. This ditch was six feet wide and a foot deep. Its location is shown on defendant's Exhibit No. 1, the original of which has been transmitted to the clerk of this Court. From this exhibit and from the tabulation of acreages made by Mr. McClellan (276) it appears that in 1889 there were 438.4 acres under irrigation at

Rancho Grande. The Court found that in 1883 there were 300 acres under irrigation on that ranch. Therefore there must have been an increase of approximately 128 acres between 1883 and 1886. This increase should be added to the 125 acres which the Court found was brought under irrigation at the Winecup Ranch in 1886, making a total of 253 acres of additional irrigation for that year. Assuming that the Court's finding of 50 acres of increased irrigation for 1889 is correct, we have the following:

	100 acres from 1875;
An additional	300 acres from 1883;
An additional	253 acres from 1886;
An additional	50 acres from 1889;
An additional	192 acres between 1889 and 1904.
<hr/>	
Total,	895 acres.

To complete the statement at this point we will anticipate the argument which follows by assuming a duty of 4 acre feet per acre which, when applied to the acreages above stated, gives results as follows:

400 acre feet as of May 1st, 1875:
1200 acre feet as of May 1st, 1883;
1012 acre feet as of May 1st, 1886;
200 acre feet as of May 1st, 1889;
768 acre feet dating between 1889 and 1904.

According to the witness Way there was an additional 157 acres under the old irrigation. If we assume that this acreage should be added to the latest right there would be a total of 1396 acre feet between 1889 and 1904.

This brings us to the consideration of the question as to what is the duty of water for these lands of the Vineyard Company. Considerable of the evidence in the record was directed to this point. It was conclusively shown by irrigators that it was the general practice in that section of the country to irrigate such lands by the flooding system. As there was no evidence to the contrary we will quote only sufficient of the record to illustrate the character of the testimony that was introduced on this subject.

Mr. Walter Gamble had been acquainted with these properties since the year 1875. He testified (138) that as early as 1873 he went on to the Rancho Grande and that the land on both sides of the channel was irrigated either by dams placed in the channel or by ditches that were taken out for the purpose of irrigating the higher lands:

“That there were dams put in Willow Creek in 1889. Water was taken out and put into this slough and taken down and a dam put in and a ditch taken out that ran down into two lower fields. I refer to the field at the house. The upper field was the one above the house. There is a field between these two fields where the house is. It is a grass pasture and was irrigated as soon as I could put the water on in the spring. (139.)

I did irrigating in all the fields. In the spring of 1905 Mr. Workman had been there that winter and he quit and when the water came down I had to go up and tear the boards off

the dam to let the water out and from then on I irrigated all the fields. I would go up and put the water into the main ditch and turn it out wherever I wanted it and scattered it all over the land. I irrigated both the east and the west side. I began along in April and stayed there for 20 days and kept the water over the fields during that time. It was necessary to keep the water over the fields in order to get a crop. Prior to that time water was put out each spring, just as soon as the weather would permit in the same way that I have described. It was kept there until time to cut the hay. I used all the water in the ditches for that purpose. It was necessary to use the water that came through the ditches in order to grow crops of hay. (140.)

Irrigating was done on Rancho Grande fields in the fall of the year to make the grass grow for pasture. Mr. Armstrong had some five to eight thousand head of cattle. Irrigation was carried on on Rancho Grande until it froze up. It was irrigated every fall just as soon as the hay was taken off during the time I was there. (142.)

It was irrigated as early as we could put the water on in the spring continuously from 1886. There was about 100 acres irrigated when I went there in 1875. It was increased from time to time. After 1886 the Winecup field was irrigated for pasture the same as in 1875.

It was increased several acres after 1886. I did ditching on Spring Creek in 1904 to irrigate the alfalfa and pasture land, put in a ditch about two feet wide and two feet deep. The irrigation of the pasture land was to raise grass. I flooded the land and kept it there during the irrigation season. The irrigation season for summer crops on Rancho Grande and Spring Creek is from the first of March until into August. It depends on the season largely. If it is a warm, early spring, we usually put the water out in March if possible. If it is a late spring the water is held off a little later.” (143.)

Mr. C. J. Franklin, an irrigation engineer who made a study of conditions on these ranches, testified: (174.)

“The method of irrigation employed on both Rancho Grande and Winecup as I observed them when I was there is the broad or flooding method of irrigation. The waste water ran into other ditches or sloughs and was carried by them and re-diverted and found its way into other ditches or sloughs. The custom was to put a dam in a slough and take out a diversion which was spread over the land and lower down, sometimes as low as 300 feet or so, put in another dam and take out another diversion where the stream would have assumed virtually its normal size at two or three or four hundred feet below the dam and then take out

another diversion, and so on. One particular slough that I examined had seven dams in about one-half a mile. These dams appear to be old structures. It was hard for me to say; and were built mostly of manure and brush and were evidently quite old. From my inspection of this slough and general inspection of the country I would be satisfied that all water not lost in natural losses was returned to the stream. (174-5.)

There is a space at Rancho Grande that I noticed that was about a quarter of a mile from the stream, but there was one canal in that distance, the canal being about 700 feet from the stream as I remember it. I have been designing irrigation works and supervising their construction. I have written a great many reports on irrigation works of one kind or another and have been over a great deal of portions of Southern Idaho and some of Oregon, and inspected these things from the point of desiring to be acquainted with the systems and methods employed in the application of water. That was necessary in connection with my work as an irrigation engineer. From the observations I made of the lands and the method of irrigation employed on those ranches, it is my opinion that no other method of irrigation could be employed than that which is employed there. (175-6.)

The old fields that I saw there are not in all instances bordered by a little bench just above the ditches. They have a slope from the ditches to the river on one side and on the Rancho Grande between the river and the canal on the west side there is a level space. I took a transverse section there; and then it sloped from that canal up to the limit of the irrigated area in a very general slope; no benches. On the outside of the ditches on the Grande Ranch the land rises a little bit. It is in a valley and there are hills on both sides.

The lands lying outside the ditches are foot hills with more or less precipitous slopes. (177.)

By saying that no other method of irrigation on this land could be adopted I meant under existing conditions, the natural unlevel state. I meant that they would have to be flooded and that the land is somewhat irregular and in its natural state would require the flooding system to cover it all. I don't see that any other system could be applied and get the water over the whole thing. What I meant to convey was that the water would need to be spread over the surface under existing conditions." (178.)

The witness, Lowell T. Rasmussen, (197) testified that he had had experience as an irrigator in New Mexico, Colorado, and on the ranches of the Vineyard Company in Nevada. He says:

"I turned the water out on the Rancho Grande

and the Winecup fields in the latter part of March of this year. In parts of the meadows the water was taken off at periods and at other places it was run continuously. I observed the effect upon the vegetation there when the water was taken away from the land for different periods. According to my observation the water could be taken from the land after it had been irrigated about four days before the hay would suffer. At the expiration of that time the ground would commence to dry and the grass begin to wither. I made observations for the purpose of determining whether the crop was as good on lands where the irrigation was continuous as it was on lands where the water was applied every four days. Where the water was flooded continuously there was a good deal the best crop of timothy hay. During the year 1915 there was a part of the land that was not watered as often as every four days. The longest interval that I know of any part of the land not being irrigated was about six days. On the land that was not irrigated for intervals of six days the crop was stunted. The soil appears to be very porous there. It is loam with gravel underneath. The first irrigation required about three times as much water as the subsequent irrigations. The snow was off the ground when I commenced irrigation in the latter part of March. The method of irrigation was by flooding the land. It was

not possible to use any other method on those lands." (198-9.)

By an experiment performed before the conclusion of the trial, it was demonstrated that 1.8 acre feet of water per acre was consumed in a single irrigation on the Grande meadow. (200.) It is true that at the time of this experiment the land was very dry and the stream available for use was not as large as could have been used to good advantage. But the experiment is instructive, nevertheless. It showed at least that the soil on these ranches is of a highly porous character and requires a relatively large amount of water to produce the desired degree of saturation.

The plaintiffs' expert witness, Mr. C. J. Griffith, on cross-examination as to the duty of water on lands such as those at Rancho Grande, testified as follows: (168) "Assuming that it was necessary to continuously run the water over the land in order to produce the best crop, the amount of water turned out at the head would be about *five miners' inches per acre continuously*. That would be required to keep the water running over the land at all times. I have never made any experiments to determine whether it is necessary to keep water flowing over such crops as are produced on the Winecup fields in order to get the best results. (168.) I know that it would take about 40 acre inches per acre for the irrigation of Rancho Grande lands, assuming that the water was turned over and overflowed practically all of the land, *say ten times during the irrigation season*. If

the water was running continuously over it you would have to have a diversion in the neighborhood of five miners' inches per acre running on and off."

The testimony of the witness, Caleb Tanner, (208) is especially noteworthy in this connection. He is a graduate civil engineer of Harvard University and since his graduation has devoted practically all his time to irrigation engineering. He had been connected with the United States Geological Survey and with the United States Reclamation Service; had been State Engineer of the State of Utah for eight years. Since retiring from that position he had been connected with two large irrigation companies in an advisory capacity, and had been detailed particularly to furnish and collect evidence with reference to the duty of water. He was conversant with the literature of the subject and ever since his graduation had been engaged in one capacity or another in connection with the use of water for irrigation. His observation had extended to the irrigation of grains, forage crops, fruits and practically all kinds of crops grown in the great basin. He had been called upon to determine the quantity of water that was necessary to produce hay crops, such as alfalfa, timothy and natural meadow. He had carried on investigations concerning these crops at altitudes quite similar to the place where the defendants' lands are located. In brief, Mr. Tanner showed every qualification for giving a sound opinion concerning the duty of water. His mental bias, if he had any, was in the direction of a more economical use of water, because his activities

had for the most part been for the purpose of aiding water users to employ economical methods. He testified that he had made a study of the conditions at the defendants' ranches in Nevada, and with reference to the best methods of irrigation of those lands, he said: (211) "The soil is sandy loam for the average depth of three feet; the subsoil is gravel. I do not know to what depth it extends. I made observations as to the location of the ditches on those properties and the lay of the land, the irregularities, if such existed, in the surface, and conditions that would affect irrigation there. My purpose was to form some basis so far as I was able in that interval for a judgment as to the requirements of that land to grow the kind of crops that were on the ground. I had sufficient time to look over the superficial conditions, the general soil conditions and the character of the crop that was grown there. I looked at the ditches and their location with reference to the surface of the land to determine whether or not they were reasonably well adapted to the irrigation of those lands economically. They were adapted to the irrigation of those lands. I would say that so long as the lands are used for the growing of forage crops such as exist there that no other system of irrigation or ditch construction could be adopted by which an appreciably greater economy in the use of water could be brought about on the east side. On the west side of the upper field, particularly in the upper end of the field, considerable improvement might be made there at rather a

high expense. There are some rather strong irregularities that make the use of water less advantageous than it would be as it exists at the present time. I mean by plowing it up and leveling down the lands and re-seeding it. That is the only way it could be done. (211-12.) I should say that irrigation could be ordinarily advantageously applied at least until the first of September and might in many seasons continue for some period after that. I think I have a fair judgment from my observations there at Rancho Grande and from my investigations of other tracts of similar character in different parts of the country and from my knowledge in general as to about what the duty of water is, for the irrigation of those lands. In my judgment it would be *4 acre feet per acre*. The duty of water when it is spoken of in acre feet ordinarily is the application of the water to the surface of the land; when you speak of it in second feet you mean the diversion from the natural stream. In ascertaining the number of second feet that should be applied to land it is necessary to take into consideration the necessary losses in getting the water onto the land; also some loss running off the land at the ends, and things of that kind. *In estimating 4 acre feet I do not take into consideration any of those losses. It is water actually applied to the land.*" (214-215.) "For such land as would produce a good crop of wheat in the vicinity of Grande and Winecup Ranches it would require about 3 acre feet. *I think it would take 25 per cent. less for wheat than it would for the other crops that are growing there.*

It would require about the same for oats as for wheat." (218.)

There was no evidence introduced in conflict with the testimony of these witnesses, unless possibly it may be contended that a conflict was raised by the testimony given by certain witnesses who testified on behalf of plaintiffs at a later hearing concerning the use of water on other lands.

We think, however, that the testimony of these witnesses does not conflict, but rather that it harmonizes with the testimony introduced by the defendants. Of course the conditions at the places mentioned by the witnesses were not similar to the conditions that prevail on the lands of the Vineyard Company, and their observations, it is true, were plainly of a casual and haphazard character. But taking their testimony for what it is worth, it appears therefrom that it is necessary to keep the ground wet continuously in order to produce wild hay crops.

These witnesses for the plaintiffs and their testimony are as follows:

W. M. Worthington testified (222) with reference to irrigation on the Horseshoe Ranch and the Jews Harp Ranch. He said:

"The water is thrown out by the floods and beaver dams and things that might be in the creek and then we generally try to irrigate it once or twice after that. We would irrigate about the first of July, the last time. The time when the floods ordinarily go off so as to leave the land dry varies with years. (222-23.) . . .

There are beaver dams in the natural stream through this land. In places it holds the water back. The land receives sub-irrigation as a result of these obstructions. It subs across a 40-acre piece. I don't think the lower part of the meadow land received sub-irrigation as a result of those obstructions in the stream. It doesn't become necessary every year to take out the obstructions in the stream, to harvest the crop. In the lower part we don't harvest it on the Jews Harp. There is a 40-acre strip in that. We don't harvest it because there is too much water. (224). I never did any boring for the purpose of ascertaining how high the ground water was at different seasons of the year. On the Horseshoe Ranch I think they mow about 400 acres as near as I could guess at the present time. It has been three or four years since I had anything to do with the irrigation of that land. There is no natural overflow in that field. All of the water used for irrigation is taken out through ditches. There might be a very little sub-irrigation on the bottom there. The elevation of the ground water in that field, I imagine, would be about the same as the Jews Harp; I do not know, but that is my judgment. I observed that when we had our floods and they continued for a long time and deposited a wash-out on the meadows, and the water stood there, we didn't have near as good a crop as we did when it flooded over

and would go off and give it a chance to grow.”
(224-25.)

Walter T. Holt (225) testified that he owned a mountain ranch in Box Elder County, Utah; that “on my ranch I had wild meadow—a mixture of hays and grasses. I had wire grass, blue grass, and what I called wild red-top. I cultivated this ranch and raised hay there for about 20 years, between 1884 and 1906, along in there. I got off a ton or a little better to the acre. I irrigated twice each season. I would commence sometimes the latter part of May and sometimes along about the 8th or 10th of June. The last time I would irrigate would be along about the last of June or up until the 10th of July. I would cut my crop along about the last of July or the first of August. I did not find it necessary to irrigate every four or five days. I had 160 acres in the wild meadow. I would use a head of water, along about 150 inches, to irrigate with. It would require me, with that head, about 14 days, to irrigate the 160 acres. (226.) Usually this meadow land is quite moist up to July, with the spring rains and the overflow of the land. There were some high places. On the high places the grass didn’t die particularly; I would start in to irrigate and start the water on the high places and the low places would take care of themselves. The irrigation that I gave in those two seasons of the year

would keep the land moist until the hay was harvested. Some seasons it would be a little different of course. . . . Two irrigations would keep the land sufficiently moist to preserve the hay and cause it to continuously grow until the harvest time. The land would be pretty good and moist most of the time ; not up to the surface, but it would make a good crop. I can generally tell by the hay whether it is drying out or whether it is thriving. It should have continuous moisture to cause the hay to grow. *Hay of that character will cease growing the moment all of the moisture gets out of the soil.*" (227.)

John C. Boren, (227) a resident of Oakley, Cassia County, Idaho, said:

"On this ranch of mine I raise about a ton to the acre on natural wild meadow. I irrigated from once to twice, depending upon the overflow of the creek. I cut the hay along the latter part of July or the first of August. To irrigate the 75 acres I took a head of water of 75 to 100 inches. I would leave that on the ground fourteen or fifteen days, maybe, at a time, running it over there. (228.) The creek ran practically down through it. It extended only for a short distance on either side. It received its water from Trapper Creek on one side and from Goose Creek on the other. Take it most any ordinary year, most of the land overflowed more or less; it would over-

flow that low land. I never had a failure of crop there. Under my method of irrigation, I kept the ground moist until harvesting. It seemed to hold the water pretty good. The ground was kept moist up to harvesting time.” (228-29.)

S. P. Worthington, (229) another resident of Oakley, said that he was somewhat familiar with the irrigation at the Horseshoe Ranch and the Jews Harp Ranch. He testified:

“The frequency of irrigation upon these ranches depends largely upon the character of the year. When we have a very wet season, and the creek overflows the grass early in the spring, and then recedes, why we have raised a splendid good crop of hay with one irrigation afterwards. (229.) I rather think that the form employed in irrigating the Jews Harp and Horseshoe Ranches would be to keep the ground moist so that the hay would grow.” (230.)

Certainly there is nothing in the testimony of these witnesses that has any tendency to contradict the testimony introduced by defendants with reference to the duty of water. The most that can be claimed for it is that two irrigations of 14 days each suffice to produce some kind of a crop, if the overflow and sub-irrigation is sufficient in the early part of the year. The witnesses all agree that it is necessary to keep the ground moist from the time when

the hay starts to grow in the spring until it is harvested in the late summer. This, of course, is all that is necessary for the production of hay and pasturage on the lands of the Vineyard Company. On these lands, however, it is necessary to keep the water flowing over the surface in order to produce the continued condition of moisture that, in the case of the other ranches just referred to, was brought about, in part, by natural overflow and sub-irrigation.

The Court found (283) that a reasonable duty of water for the defendant would be "at the rate of three acre feet per acre for its hay and grain lands and two acre feet for its grass and pasture lands." We do not know of a suggestion anywhere in the record that any less water would be required for the defendant's pasture lands than for its so-called hay and grain lands; in fact the evidence is quite to the contrary. Mr. Tanner said that grain lands would require about 3 acre feet per acre, and that this would be about 25 per cent less than would be required for the kind of crops that were grown on the defendant's properties. If there is any testimony in the record justifying the allowance of a smaller quantity of water for the irrigation of pasture and meadow lands than for the irrigation of grain crops we will be obliged if counsel for appellees will call our attention to the same in their reply to this brief.

In determining the question now under consideration some attention should be paid to the conditions under which the operations of defendant are carried

on. These properties are located in the wilds of Nevada at a great distance from the market and of value only for the production of forage for cattle and horses.

The crops produced there are mainly of a character that requires a relatively large amount of water for their growth. It seems to have been the conception of the trial Court that the methods of irrigation on these properties should be reformed; that the practice of growing wild hay for pasturage purposes should be abandoned and other forms of agriculture substituted therefor. Possibly this is a matter upon which opinions might differ but it surely is one that rests within the discretion of the owner of the property.

The Court erred in decreeing absolutely to the plaintiffs any of the waters of Goose Creek and its tributaries, in excess of the quantity, to-wit, about 30,000 acre feet which has been used by plaintiffs for beneficial purposes.

This point is raised by the seventh assignment of error, which is as follows:

“The Court erred in decreeing absolutely to the plaintiffs any of the waters of Goose Creek and its tributaries in excess of the quantity, to-wit, about 30,000 acre feet, which has been used by plaintiffs for beneficial purposes, and in enjoining the defendant, Vineyard Land and Stock Company, from using any of such excess waters prior to the actual application of the same by plaintiffs to the beneficial uses for which said waters are claimed; and in

making and entering any decree herein with respect to such excess waters, except to determine the amount thereof that can be diverted through plaintiffs' works, and the priority of the same, and to set a time within which such amount of such excess shall, subject to the rights of the defendant, be applied by plaintiffs to the purposes for which the same is claimed."

It will be remembered that in 1915, when this cause was tried, there was under irrigation under plaintiffs' project, approximately 20,000 acres of land. (72.) The duty of water on these lands, as we have seen, is one and one-half acre feet per acre, which would amount to 30,000 acre feet in all. The Court was far more generous than Nature has been. By the decree it awarded to plaintiffs a vastly larger quantity of water than there is flowing in the stream. The Court also found that the plaintiffs were entitled to irrigate a very much larger area of land than even they themselves claimed. In addition to the so-called "old rights," the Court awarded them 1100 second feet, under their later appropriations. Eleven hundred second feet flowing continuously for an irrigation season of four months would amount to 264,000 acre feet. Thus the decree seems to be based on the theory that the plaintiffs were entitled to a decree fixing their vested, as well as their inchoate rights, under their permits, and enjoining the defendants from interfering in the future with such rights.

There have been instances, it will be conceded, in which decrees have been entered, granting injunctions against future violations of rights, in the absence of any present infringement or damage. These cases, however, are all confined to the protection of rights that have already vested, although they may be not at the time infringed. For instance, a riparian owner, whose title does not depend upon beneficial use, may be entitled to a declaratory decree protecting his present rights as against any future invasion, but the rights of the riparian owner under such circumstances are present rights, not rights to be earned *in futuro*. The same doctrine is applied in cases of the diversion of underground waters, where, as in *Burr v. Maclay*, 98 Pac. 260, it is said:

“If the adjoining overlying owner does not use the water, the appropriator may take all the regular supply to distant land until such landowner is prepared to use it and begins to do so.”

This is upon the principle that the owner of underground water, by virtue of the ownership of the lands in which it is found, has the present right to its use, but he should not be allowed to enjoin its use by another who draws it out or intercepts it or to whom it may go by percolation, although perhaps he may have a right to a decree settling his right to use it when necessary on his land if a proper case is made. But in both of the instances discussed above, that is, the right of a riparian owner and the right of an owner of land to its underground waters, there

were involved present actual rights, not prospects contingent upon future acts.

The decree is manifestly erroneous as to all water awarded to plaintiffs, with the exception of the 30,000 acre feet which up to the time of the trial had been applied to beneficial uses. Chapter 35, Laws of Idaho for the year 1913, amending section 4621 of the revised statutes, provides:

“In allotting the waters of any stream by the District Court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied, and when such water is used for irrigation, the right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land which is irrigated by such water, and such right will pass with the conveyance of such land, and such decree shall describe the land to which such water shall become so appurtenant. The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed; provided, that in the case of works capable of diverting more water than is applied to a beneficial purpose at the time the rights of the person or persons owning or using such works are adjudicated by the Court, the right only to the water beneficially applied at the time of making such allotment shall be confirmed by the Court, and the Court shall

ascertain the amount of water which can be diverted through such works in excess of such quantity beneficially applied, and shall set a time when such amount shall be applied to the beneficial purpose for which it is intended, which time shall not exceed six years from the date of the decree issued by such Court under such adjudication, and any person using any of such water which was not beneficially applied at the time of such adjudication shall, before the expiration of the time set for such beneficial application, make proof of such beneficial use in the manner provided in Section 3260 of the Civil Code, and such right, when confirmed in the manner provided in this Chapter and Chapter 2 of Title 9 of the Civil Code shall relate to the priority established by such Court, and if such application of any of such water shall be made subsequent to such date, then the priority of the right to the use thereof shall be determined in the manner provided in Section 3261 of the Civil Code.”

The Supreme Court of Idaho, in *Sugar Company v. Goodrich*, 147 Pac., at page 1076, say:

“The state is the sovereign owner of the right to appropriate and use all of the stream waters which are within the jurisdiction of the state. The state, by enactment of appropriate laws, permits private persons to use its right to appropriate and use the flow of stream water. A

water right claim is not a water right. A water right claim is a declaration of intention, made in a written form prescribed by statute, to give public notice of intention to create water rights identical with descriptions stated in the writing, commonly referred to as a water right. Although they are not, water right claims have become commonly regarded as being the same thing as water rights. One is a mere declaration of intention to create a water right which may never be anything more than an intention. By a compliance with conditions of the permit, the water right claim then becomes a water right. The statute may permit an appropriator to change any or all of the conditions contained in the declaration of intention, except the particular stream from which the diversion is intended to be made, but it could not be successfully maintained that a subsequent appropriator's right to the use of the waters of a stream should be impaired by change in the declaration of intention to appropriate by the act of the party, or with the consent of the state engineer, or to change the point of diversion. The extent of the permit of the state is measured by the use of the water under the conditions and limitations of the permit. A failure to put the water to a beneficial use, or to comply with the conditions of the permit, is an abandonment of the use, and this would be true whether or not there was a statute containing such a provision."

Numerous authorities might be cited in which the principle now under discussion has been applied. The following brief quotations will serve to illustrate the manner in which the principle is applied to water cases.

In *Miles v. Butte Electric & Power Co.*, 79 Pac. 549, it was said:

“Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water or water right does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water or for damages for the diversion.”

In *Green Valley Ditch Co. v. Frantz* (Colo.), 129 Pac. 1006, the court say:

“A decree for plaintiffs in an action to quiet title to an irrigation ditch and its appropriation therefrom should be limited to the amount theretofore actually carried through the ditch and applied to a beneficial use, making the necessary allowance for seepage and evaporation.”

In *Bowen v. Spaulding* (Or.), 128 Pac. 37, the court say:

“The drastic remedy of injunction will not be granted to protect water rights unless not only the appropriation by notice but also the actual application of the water to the intended use and the necessity of the use for the purpose in question be clearly shown.”

The Court erred with respect to those provisions of the decree intended to operate upon property and rights and to regulate the internal affairs of appellant in a foreign state.

Under this general heading may be grouped for discussion the Sixth, Eighth, Ninth, Tenth and Eleventh assignments of error, which are as follows:

VI.

“The Court erred in limiting and restricting the defendant, Vineyard Land and Stock Company, with reference to the sizes of irrigation streams to be used by it in the irrigation of its lands in the State of Nevada from the waters of said Goose Creek and its tributaries. (296.)

VIII.

“The Court erred in making and entering its decree herein enjoining the defendant, Vineyard Land and Stock Company, from changing the points of diversion and places of use of the waters of said Goose Creek and its tributaries, in the State of Nevada, as authorized by the laws of said state. (297.)

IX.

“The Court erred in making and entering its decree herein enjoining the defendant, Vineyard Land and Stock Company, from irrigating its lands in the State of Nevada by means of dams placed in the natural channels of said Goose Creek and its tributaries, and in sloughs and other channels leading therefrom,

thereby flooding said lands without the use of artificial canals, ditches and conduits, and in enjoining the defendant, Vineyard Land and Stock Company, from diverting any of the waters of said stream or its tributaries, except by means of ditches or other devices provided with automatic measuring guages. (297.)

X.

“The Court erred in making and entering its decree herein, requiring the defendant, Vineyard Land and Stock Company, to install in all of its ditches, canals and conduits, in the State of Nevada, automatic measuring devices for measuring all waters used by the said defendant from said streams, in said state, and in decreeing that all such measuring devices and guages shall at all times be subject to the inspection of plaintiffs; and in decreeing that plaintiffs should have the right to go upon the lands of said defendant in the State of Nevada for the purpose of inspecting the measuring devices installed by defendant in its said ditches, canals and other conduits. (297-8.)

XI.

“The Court erred in making and entering its decree herein, in retaining jurisdiction for the purpose of making rules touching the manner of diverting, measuring and distributing said

waters, or for the purpose of making rules concerning the devices to be installed and used for diverting, measuring and distributing said waters, or for the purpose of directing the defendant, to keep records of the amounts of water diverted by said Vineyard Land and Stock Company or for the purpose of requiring defendants, or either of them, to make or file reports concerning the amounts of water diverted, or for the purpose of appointing commissioners or watermasters to make distribution of said waters, or for the purpose of making any order whatever touching the distribution, points of diversion, places of use, or methods of irrigation, in the use of said waters by the defendant, Vineyard Land and Stock Company, in connection with the irrigation of its lands in the State of Nevada.” (298.)

By its decree the Court in substance provides (286-293) (a) that the Vineyard Land and Stock Company must use the waters constituting its prior rights as recognized by the decree, only upon such lands as are specifically described in the decree; (b) that said Company must install in its canals and ditches automatic measuring devices, and refrain from the use of any waters for the irrigation of its land except such as are diverted through canals and ditches provided with such automatic measuring de-

vices; (c) that the measuring devices so provided shall at all times be subject to the inspection of plaintiffs and that plaintiffs shall have access to the premises where such measuring devices are situated; (d) that the Court retain jurisdiction to make rules touching the manner of diverting, measuring and distributing the water and the devices to be installed and used for such purposes and to direct that the said defendant keep records of the amounts of water diverted, and to file reports thereof from time to time, and to enable the Court to appoint commissioners or wastermasters to make distribution of the waters in accordance with the terms of the decree; (e) that said defendant should have the right to divert from Goose Creek and its tributaries, at the rate of not to exceed six and one-half cubic feet per second of time for the Winecup Ranch; nine cubic feet per second of time for the Grande Ranch; and two and one-half cubic feet per second of time for the Spring Creek Ranch.

It will be seen at once that these provisions of the decree constitute very material restrictions upon the rights awarded to the defendant. They were inserted in the decree without any notice to defendant, and without any opportunity to the defendant to be heard with reference thereto. There is not a hint in the pleadings nor a suggestion at the trial that any such onerous provisions would be inserted in the decree. It is not putting it too strongly to say, there-

fore, that material rights belonging to the Vineyard Land and Stock Company have in effect been condemned for the benefit of the plaintiffs without pleading, proof, or other essentials of due process of law.

While it is freely conceded that a court of equity with jurisdiction over the persons of litigants, can, under some conditions, enjoin them from the performance of acts with respect to property outside of the territorial jurisdiction of the court, and can even go so far as to compel a party to perform affirmative acts for the abatement of a nuisance in a foreign state, where the injurious effect of such nuisance operates upon property or rights of one of the parties within the jurisdiction of the court (Salton Sea cases), yet we know of no case in which a court of equity has attempted to give ex-territorial operation to its decree to anything like the same extent as is attempted by the decree now under consideration. Generally speaking, the power to exercise injunctive control of a person with respect to property beyond the territorial jurisdiction of the court must be based upon duties or obligations growing out of trust, contract, or fraud. It is conceived that these furnish a basis for the exercise of control over the conscience of a party. In a few cases, and seemingly *ex necessitate rei*, injunctive relief has been granted in the case of torts committed beyond the jurisdiction of the court. (Rickey Land and Cattle Co. v. Miller and Lux, 152 Fed. 11; Willey v. Decker, 11 Wyo. 496;

Howell v. Johnson, 89 Fed. 556; Taylor v. Hulett, 15 Idaho, 255.) The principle of these cases was extended somewhat in the Salton Sea cases so as to compel the performance of such affirmative acts as were necessary (stopping the flow of water) to abate the nuisance complained of. In this decree, however, a more or less elaborate system of regulation and control directly affecting appellant's rights and property in Nevada is provided for. The court was not content to define the rights of appellant and to leave the matter of administration of such rights to the control of the state officials of Nevada, whose duties are imposed by the legislature of that state, but in addition to granting injunctive relief, the Court commands the performance of affirmative acts in no wise necessary in order to put an end to the operation in Idaho of any wrongful act of appellant in Nevada, and also attempts to regulate the internal affairs of appellant and to directly affect property and rights whose situs is in the foreign state. The placing of automatic measuring devices in the canals and ditches of appellant is clearly separable from the injunctive relief granted by the decree. It will not be contended that appellant would necessarily have any difficulty in rendering obedience to the injunction without the aid of such appliances. It may be said, indeed, that the use of automatic measuring devices is exclusively for the purpose of enabling appellees to inform themselves as to whether or not appellant is obeying the injunction. The consequences of the use or non-use of such measuring de-

vices could not possibly be said to operate in the State of Idaho so as to form any analogy to the decisions in the Salton Sea cases. The same thing may be said of the requirement of the decree that the appellant shall keep a record of the measurements of water and furnish the same to appellees. With respect to the attempt of the Court to saddle the lands of appellant with an easement in favor of appellees, or to give appellees a perpetual license to go upon and over the lands of appellant in Nevada at their pleasure, there is, we submit, no precedent. Of equal futility are those provisions of the decree whereby the Court assumes to retain jurisdiction for the purpose of regulating the appellant's conduct in Nevada and for the purpose, if needs be, of appointing commissioners for the purpose of going into Nevada and of there distributing water to appellant. We are unable to conceive of any basis for the exercise of such a power. Suppose the Court should appoint commissioners for the purposes named and that under the Court's order such commissioners should proceed into the foreign state and there assume to act under the authority of such order, can it be contended that they would act otherwise than as trespassers? In this connection it should be borne in mind that the State of Nevada by statute has provided for an extensive and elaborate system of water distribution by officers of its own creation. These officers are clothed with power to regulate head-gates, measuring devices and all other appliances deemed by them to be necessary or convenient in the diversion, distribution and use of

water. Is it conceivable that this decree could bar the exercise of these sovereign powers by the State of Nevada?

One of the most onerous and vital provisions of the decree to be discussed under this head is the one that enjoins appellant from using the waters constituting its prior right upon lands other than those mentioned in the decree. Regardless of the question as to whether the Court had jurisdiction with respect to this provision of the decree, its action in the premises is obviously erroneous. The question as to where the waters of the State of Nevada may be used is one that must be answered not by what a Court in a foreign state may provide, but by what the legislature of the State of Nevada enacts. In the language of Mr. Justice Field in *Pennoyer v. Neff*, 95 U. S., at 722:

“The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its in-

habitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, *Conf. Laws*, c. 2; Wheat. *Int. Law*, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such persons or property in any other tribunals.' Story, *Conf. Laws*, sect. 539."

The State of Nevada through its legislature has at various times since its organization asserted ownership of all waters within the state and has provided methods not only for the appropriation of such waters, but also for the change of places of diversion, places of use and manner of use. In 1913 a complete codification of laws with reference to the appropriation and use of waters under state control was adopted by the legislature of Nevada. (Session Laws of Nevada for the year 1913, pp. 192-220.) Section 1 of the act provides:

“The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public.”

Section 52 provides:

“There shall be appointed by the state board of irrigation one or more water commissioners for each water district, who shall receive a salary, including all expenses, of not more than five dollars (\$5) per day for each day actually employed on the duties herein mentioned. Such water commissioner shall execute the laws prescribed in sections 53 to 58, inclusive, of this act, under the general direction of the state engineer. * * * ”

Sections 53 to 58 provide:

“Sec. 53. The state engineer shall divide the state into water districts to be so constituted as to insure the best protection for the water

user, and the most economical supervision on the part of the state. Said water districts shall not be created until a necessity therefor shall arise and shall be created from time to time as the priorities and claims to the streams of the state shall be determined.

“Sec. 54. It shall be the duty of the state engineer to divide or cause to be divided the waters of the natural streams or other sources of supply in the state, among the several ditches and reservoirs taking water therefrom, according to the rights of each, respectively, in whole or in part, and to shut or fasten, or cause to be shut or fastened, the head-gates or ditches, and to regulate, or cause to be regulated, the controlling works of reservoirs, as may be necessary to insure a proper distribution of the waters thereof. Such state engineer shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir where rights have been adjudicated in accordance with existing decrees. Whenever, in pursuance of his duties, the water commissioner regulates a head-gate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such head-gate or controlling works a written notice properly dated and signed, setting forth the fact that such head-gate or controlling works has been properly regulated and is wholly under his control, and such no-

tice shall be a legal notice to all parties interested in the diversion and distribution of the water of such ditch or reservoir. It shall be the duty of the district attorney to appear for or in behalf of the state engineer or his duly authorized assistants in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said district attorney.

“Sec. 55. Any person who shall wilfully open, close, change or interfere with any lawfully established head-gate or water-box without authority, or who shall wilfully use water or conduct water into or through his ditch which has been lawfully denied him by the state engineer, his assistants or water commissioners, shall be deemed guilty of a misdemeanor.

“The possession or use of water when the same shall have been lawfully denied by the state engineer or other competent authority shall be *prima facie* evidence of the guilt of the person using it.

“Sec. 56. The owner or owners of any ditch or canal shall maintain to the satisfaction of the state engineer of the division in which the irrigation works are located, a substantial head-gate at or near the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the water commissioner; and such owners shall construct and maintain, when required by the state engineer, suitable measuring devices at

such points along such ditch as may be necessary for the purpose of assisting the water commissioner in determining the amount of water that is to be diverted into said ditch from the stream, or taken from it by the various users. Any and every owner or manager of a reservoir located across or upon the bed of a natural stream or of a reservoir which requires the use of a natural stream channel, shall be required to construct and maintain, when required by the state engineer, a measuring device of a plan to be approved by the state engineer, below such reservoir, and a measuring device above such reservoir, on each or every stream or source of supply discharging into such reservoir, for the purpose of assisting the state engineer or water commissioners in determining the amount of water to which appropriators are entitled and thereafter diverting it for such appropriators' use. When it may be necessary for the protection of other water users, the state engineer may require flumes to be installed along the line of any ditch. If any such owner or owners of irrigation works shall refuse or neglect to construct and put in such head-gates, flumes, or measuring devices after ten (10) days' notice, the state engineer may close such ditch, and the same shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of

head-gates lawfully closed until the requirements of the state engineer as to such head-gate, flume, or measuring device have been complied with, and if any owner or manager of a reservoir located across the bed of a natural stream, or of a reservoir which requires the use of a natural stream channel, shall neglect or refuse to put in such measuring device after ten (10) days' notice by the state engineer, such state engineer may open the sluice-gate or outlet of such reservoir and the same shall not be closed under the penalties of the law for changing or interfering with head-gates, until the requirements of the state engineer as to such measuring devices are complied with.

“Sec. 57. The state engineer or his assistants shall have power to arrest any person violating any of the provisions of this act, and to turn them over to the sheriff, or other competent police officer within the county, and immediately on delivering any such person so arrested into the custody of the sheriff, it shall be the duty of said state engineer, or his assistant making such arrest, to immediately, in writing, and upon oath, make complaint before the justice of the peace against the person so arrested.

“Sec. 58. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof

shall be fined in a sum not less than twenty-five dollars (\$25), nor more than two hundred and fifty dollars (\$250), together with the costs, or imprisoned in the county jail not exceeding six months, and not less than ten (10) days, or by both such fine and imprisonment."

In section 59 there are the following provisions:

"Any person desiring to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion, or change in manner of use or place of use, make an application to the state engineer for a permit to make the same. * * * Every application for permit to change the place of diversion, manner of use or place of use of water already appropriated, shall contain such information as may be necessary to a full understanding of the proposed change, as may be required by the state engineer. All applications for permit shall be accompanied or followed by such maps and drawings and such other data as may hereafter be prescribed by the state engineer, and such accompanying data shall be considered as part of the application."

In section 63 it is provided that:

"It shall be the duty of the state engineer to approve all applications made in proper form where all fees, as in this act provided, have

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In section 63 it is provided that:

"It shall be the duty of the state engineer to approve all applications made in proper form where all fees, as in this act provided, have

been paid, which contemplate the application of water to beneficial use, and where the proposed use or change does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare.”

The act contains 90 sections in all and constitutes the present law of Nevada, except as amended in certain minor particulars by the legislature of 1915. Thus the State of Nevada has in the first place conferred upon appellant the right to change the place of diversion, place of use, or manner of use of its waters within that state. The Court, on the other hand, by its decree has absolutely foreclosed appellant from exercising this right. The conflict between the Court's decree and the laws of Nevada in this and other particulars to which reference has been made, is palpable and direct, and either the one or the other must yield.

The decree prohibits the Vineyard Land and Stock Company from irrigating other lands than those specifically described in the decree, even although such irrigation would not result in any increased consumption of water. In the new development to which reference has been made there are large areas of land that are better adapted for the cultivation of valuable crops than are some of the lands upon which the Court says the water may be used. These lands are located at no greater distance from the channel than the lands under the old irrigation; nevertheless, the appellant may not change the place of use so as to bring these other lands under

cultivation, even although it might do so without causing any injury to the appellees. Indeed, it might well be that with the water that is required to flood certain of the meadow-land, upon which crops of comparatively small value are produced, a much larger area of lands with better soil and better conditions generally might be brought under cultivation and caused to produce more valuable crops without the consumption of any more water.

The decree ignores the well recognized right of an owner of water to increase the effectiveness of its use. (Rogers v. Pitt, 129 Fed. 932; 1 Wiel, Sec. 483.)

In conclusion, we desire to call the Court's attention to the principle announced in the case of *Kansas v. Colorado*, 206 U. S. 117, as it would seem that the doctrine laid down in that case is particularly applicable to the situation presented by the case now under consideration. The principle we refer to is contained in the following quotation from the opinion:

“Summing up our conclusions, we are of the opinion that the contention of Colorado of two streams cannot be sustained; that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the state of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their oc-

cupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits, and may rightfully call for relief against the action of Colorado, its corporations, and citizens, in appropriating the waters of the Arkansas for irrigation purposes."

It is conceded that a large part of the drainage area of Goose Creek is in the State of Nevada; also that the only benefit that the State of Nevada can derive from the waters of that stream or its tributaries, is that which results from the use of said waters by the Vineyard Land and Stock Company. It will also be conceded that these lands are located within a short distance of the channel, and that all of the

water used thereon for irrigation, with the exception of such as evaporates or is absorbed by plant life, will return to the channel.

Respectfully submitted,

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No. 2886

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Corporation, *Appellants*,

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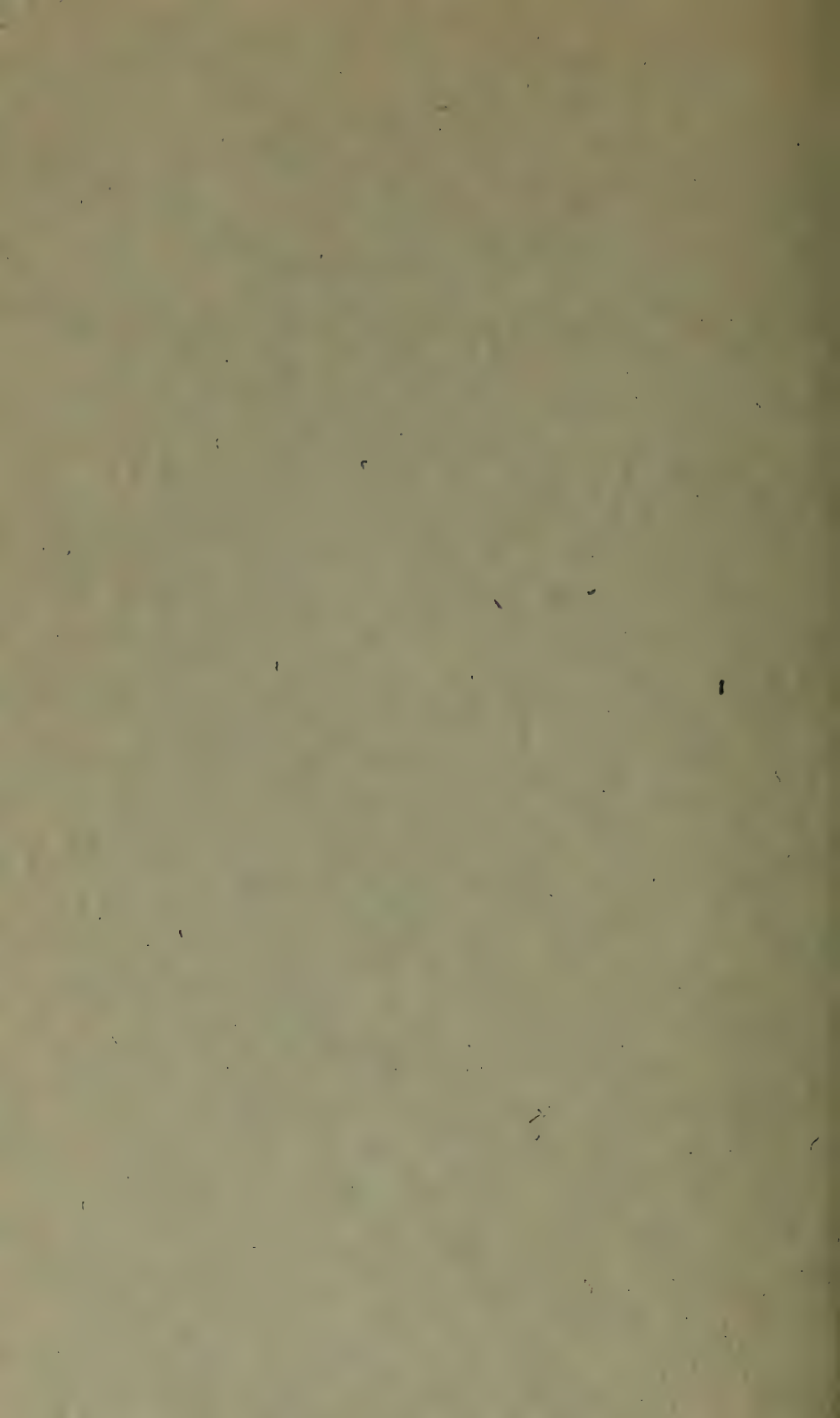
BRIEF OF APPELLEES

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STATEMENT.

This suit involves the right to the use of water from Goose Creek in Idaho and Nevada. This stream heads in Idaho fifteen or twenty miles to the north of the southern boundary of the State; flows thence southward into Nevada a distance of eight or ten miles; thence turns eastward and to the north touching the northwest corner of Utah, and thence north into Idaho emptying into Snake River forty miles or more north of the State line.

The property of the appellants is situated in Nevada and the water claimed by them is diverted

and used in that State. Along the headwaters of the stream in Nevada are a succession of small valleys where the land holdings of appellants are located. These holdings comprise a number of old time cattle ranches (pp. 100, 136, 124) which are still chiefly used for stock raising purposes.

Farther north in Idaho, the stream emerges from the mountains and the valley then spreads out in the shape of a fan until it reaches Snake River. On this fan-shaped area, the irrigation project of the appellees is situated. The property of the appellees is in Idaho and the water claimed by them is diverted and used in that State. The lands in Idaho were originally taken up and held by individual farmers who built individual or community ditches for the purpose of irrigating their lands. (pp. 82-87.) Later on, by purchase, some of the water rights at the northern end of the valley were consolidated with those at the southern or upper end in order to give a better water service. (p. 86.) Still later on, the settlers induced the Twin Falls-Oakley Land & Water Company to construct an irrigation project covering their lands and additional government lands, the project being built under the terms of what is known as the Carey Act (pp. 67, 231.)

The valley had been settled, beginning with 1875. Settlement and cultivation had proceeded until in 1888, 12,000 acres of land had been patented to the settlers and 6,500 acres were irrigated (pp. 73, 87), this being apparently the limit of land which could

be successfully irrigated by means of the existing water supply. Ditches had already been built at that date for the utilization of the entire water supply. (pp. 82, 87.) Conditions in the valley changed little from 1888 to 1909. (pp. 87, 88, 89.) In the meantime, these settlers had obtained two water right decrees upon the stream, one in 1887 (pp. 259, 77), and the other in 1892 (pp. 268, 77.) To these suits the water users in Idaho were parties. The Nevada users were not made parties.

In 1909, the settlers desiring to secure the benefits of a modern irrigation system and also desiring to have more land irrigated in their valley, negotiated with the Twin Falls-Oakley Land & Water Company for the construction of a Carey Act irrigation project (p. 73); this project to be made up of the 12,000 acres of land held by the settlers and upwards of 43,000 acres of land (pp. 23, 24, 231) belonging to the government. The project was presented by the Oakley Company to the State Board of Land Commissioners of the State of Idaho, was approved by that Board, was afterwards approved by the Department of the Interior and the works completed in the year 1913, and water turned onto the lands. (p. 70.)

The flow of the stream is small in July, being only 54.3 acre feet or 2,715 inches. In the early part of the season, in the months of March, April, May and June, the flow is considerably greater (p. 99), amounting in the month of May on the average to

202.3 second feet or 10,115 inches. Irrigation would normally commence on this project in the latter part of May or the first of June, but owing to the nature of the flow of the stream, it became necessary for the settlers to turn on the water at a very early period in order to saturate their lands and in this way to use the land as a sort of reservoir for the crops afterwards to be planted. (pp. 189, 196.) To these early day settlers water was distributed under the decrees at the rate of one inch to the acre. (p. 164.) Owing to the fact that the high flow of the stream occurred so early in the season, the settlers were of the opinion that a reservoir system might be established which would better serve their purposes and which would irrigate a large body of land. It was this view which induced them to cooperate with the Oakley Company for the building of the Oakley Project. Upon the building of the project the old settlers conveyed all of their rights to the Oakley Company and took back water contracts from that company providing for their water supply (pp. 69, 247). The Oakley Company, in addition to this, took out water permits intended to cover all of the flood waters of the stream and such additional waters as they might obtain through means of the water permits. The company also provided for obtaining a small amount of water from other small streams by means of a gathering system (p. 245), bringing the waters of these streams into the reservoir. This gathering system in some years

brought no water at all. In others, it brought a small amount (p. 71). Trapper Creek is a stream coming into Goose Creek above the irrigated area in Idaho and its waters, so far as the old settlers were concerned, were counted as part of Goose Creek. Birch and Cottonwood Creeks are on the gathering system.

The claim of the Oakley Company therefore to the waters of the stream was the claim to all of the old rights held by the original settlers and also to such additional rights as were obtained by means of the later water permits issued by the State Engineer of Idaho.

The claims of the appellants, who were the defendants in the action, were the claims to certain old rights used upon the stock ranches above mentioned. These stock ranches in the early days were occasionally overflowed by high water. Dams were sometimes placed in the stream to facilitate this purpose (pp. 102, 156.) Occasionally some canals were built. The whole system, however, was very crude, being intended, except in a very small part, only to moisten the ground sufficiently for the purpose of stimulating the growth of the native grass. The work done for irrigation on these ranches was typical of the work ordinarily done on the big cattle ranches in the early days for the purpose of "holding the water," little attention being given to the real utility of the works or to cultivating anything but native grass.

After the construction of the Oakley Company's irrigation project and the considerable enhancement in value of the Vineyard Company's property thereby, appellants actively commenced the construction of new ditches and the use of an additional water supply. This condition necessitated the bringing of this suit by the Oakley Company.

In the decree in the lower court there was given to the Oakley Company the rights claimed by the old settlers and such additional rights as they had procured by virtue of the permits, and the Court also gave to the Vineyard Company certain old rights which it claimed, various priorities being given to the various rights according to the testimony before the Court.

The grounds of this appeal, stated in their order of importance, are as follows:

1. The claim on the part of the appellant that the Court erred with respect to the water rights awarded to the plaintiffs under grants from private individuals, being the rights mentioned in paragraph (a) of the decree (p. 284.) These are what are known as the old rights, that is, the rights held by the original settlers and which were transferred to the Oakley Company.

2. That the Court erred in decreeing to the plaintiffs any of the waters of Goose Creek with the exception of about 30,000 acre feet to which the plaintiffs would be entitled under the permits issued by the State Engineer.

3. That the Court erred with respect to the quantities of water awarded to the Vineyard Company and with respect to the dates of priority thereof.

4. That the Court erred in granting plaintiffs any relief as against the defendant, the Utah Construction Company, of which the Vineyard Company is a subsidiary.

We will take up these points in the order above given.

ARGUMENT.

As before stated, the water rights which were claimed by the plaintiffs in the court below were of two kinds.

1. The rights which they obtained by transfer from the old settlers.

2. The rights which they obtained later by virtue of water permits issued by the State Engineer of the State of Idaho.

The appellants claim that the Court erred in respect to the water rights awarded to the Oakley Company under grants from the old settlers. The statement of reasons upon this point in the appellants' brief is as follows:

"Plaintiffs claim rights under purchase from former appropriators of water aggregating 300 second feet. From the nature of the proof offered by them in support of the allegations of the bill with respect to these rights, it will be seen that if they were the owners in fact of any of these early rights they acquired the same under deeds from individual grantors. The nec-

essities of the case were such, therefore, that it was incumbent upon plaintiffs to prove, first, the existence of each of said rights, and second, a conveyance thereof to plaintiffs" (p. 21, brief).

We admit, of course, that it was necessary to prove the existence of the rights and we also admit that if we claimed the rights of the old settlers that it would be necessary for us in some way to connect ourselves with them. In this respect a somewhat curious misunderstanding seems to have arisen in the mind of the chief counsel for the appellants at the argument in the court below and also on this appeal. Prior to the hearing of the case in the court below the question was discussed with Mr. Boyd, one of the counsel for appellants, as to the course to be pursued by the respective parties in regard to making proofs relating to their early day water rights. The appellants were the successors in interest of a number of old time cattle companies which had operated in this section (p. 100). It would take considerable time to show the chain of title to the land and rights to the waters which they claimed. The appellees were in a similar position. They were the successors of a large number of individuals who had initiated rights as early as 1875. From that date onward there were a large number of transfers covering the lands and water rights in the valley in Idaho. It would have taken many days to have introduced the proof showing the ownership of the

land and the ownership of the water rights. The Vineyard Company owned the land and water rights in certain mountain valleys in Nevada. The Oakley Company owned an irrigation system serving lands owned by its stockholders in Idaho. There was no real dispute about this. The only dispute was as to the amount of their water rights and their priority.

With this situation an agreement was reached whereby it would be unnecessary to show these transfers, it being agreed that each company was the owner of the rights in the respective States, that is to say, the Vineyard Company owned the rights in Nevada and the Oakley Company in Idaho. Believing that this was the understanding of both parties, the appellees started in to show the history of the Idaho water rights (p. 73 et seq). Somewhat to our surprise we were met by a series of objections by the counsel in charge of the trial, Mr. Nebeker, which, at the time, we did not thoroughly understand in view of what we believed to be the prior arrangement. After a considerable colloquy, the following statement was made:

“Mr. Hays: Mr. Nebeker, as I understand it, our stipulation is to this effect; that we are the successors in interest of whatever rights those people had under that decree. (This was an early water right decree in the State court of Idaho to which the Idaho claimants were parties).

“Mr. Nebeker: That is my understanding yet.

"Mr. Hays: So that we may confine our proof to the rights themselves?

"Mr. Nebeker: To the rights themselves.

"Mr. Boyd: In other words, that we are the owners of whatever rights we have on our side and that you are the owners of whatever rights these people may have had on your side." (This referred to the early-day settlers).

This being the understanding, the colloquy closed and the effect was this: The appellants were not required to show location notices or water permits in the State of Nevada, nor were they required to show any transfers by deed. They contented themselves with showing the use of water on the Nevada lands and the date and extent of such use. They accepted the benefits of the stipulation. On our part, we did likewise. We sought to show the history of the use of water on the lands in the vicinity of Oakley, the extent of such use, and the time when such use was initiated. We did not show deeds from each individual settler, but, in accordance with what we understood to be the prior arrangement, we presented for the inspection of the appellant and introduced in evidence an itemized list of the parties who had made conveyances to us of their water rights totaling 8,890 inches. This list is marked Exhibit No. 11, (pp. 81⁷⁴ 82). In addition to this, the form of deed used in making these conveyances was also introduced, (p. 256). Copies of the early water decrees were likewise introduced in evidence although these decrees were only among the Idaho users, (p. 77,

78. We did not claim that these decrees were in themselves such an adjudication against the appellants as they would have been if the appellants had been parties to the suit. They were offered as a part of the history of the old time irrigation conditions so far as it affected Idaho lands. Under the stipulation it was not necessary for us to show any conveyance of water rights to us from any party. We made no showing of conveyances because we understood that it was not required under the stipulation. The construction of the stipulation which we contend for was agreed to by the lower court and was acted upon by both parties at the trial. (79)

With regard to the use of water under these old rights, the proof was to the effect that in the year 1888 about 12,000 acres were patented; that 6,500 acres of land were irrigated (p. 87); that the water supply was scant even for this area (p. 87); that water was delivered that year into all of the ditches and that the deliveries took all of the water supply in the stream (87, 88). It was further shown that the same general condition existed from 1888 on down to the time of the building of the Oakley Company's works, (p. 88) *also from 1882-3* (89)

In regard to the condition of the rights prior to 1888, so much time had elapsed that it was impossible to find witnesses who knew the facts in detail, but we were able to show in a general way the beginning of the settlement of the country and its growth down to 1888, and the use of water during

that period, (p. 27). The decrees also illustrated the manner in which the water supply had been handled as among the Idaho people. Under circumstances such as these, rules of evidence shape themselves to the proof of the facts according to circumstances. Rules which apply to facts as ancient as those in this case are of necessity relaxed from the rules applying to recent transactions.

Chamberlain on Evidence, Sec. 2960 (Vol. IV).

Ancient documents are allowed to support ancient possession.

Wigmore on Evidence, Sec. 157.

Rice on Evidence, Sec. 216.

In this case, applying the rules stated by the authors above mentioned, the water right decrees in the suits between the parties in Idaho were evidence of their rights among themselves and of the extent, manner and method of distribution of the water supply as between them. It was an ancient adjudication, understood and acquiesced in for many years. It did not constitute an adjudication as against the Vineyard Company in Nevada in the sense that it would if it had been a party to the suit, but it was one of the items of evidence which might properly be introduced in a historical way to show the use of the water on the lands in Idaho, the method, amount and nature of distribution thereof. There

appears to have been no objection by any one to the method of distribution of the water supply under these decrees, certainly not by the Vineyard Company or its predecessors in interest. Our right to the old water rights held by the old settlers was shown by our showing the use of water which was made by the people of that community, the time of use and the amount thereof, it being conceded by the stipulation that we were the owners of the rights on our side of the State line.

From 1888 onwards, for many years, and down to the time of the completion of the Oakley works, the settlers on the Idaho lands used the entire flow of the stream, amounting on the average at the highest flow to 202 second feet or upwards of 10,000 inches of water. The decree in the Idaho State Court rendered in 1892 covers 10,435 inches of water. In some cases, in that decree, the period of use of water is limited. (pp. 269, 273). To illustrate, in one instance, the right of J. E. Miller to 620 inches was limited to a time between the first day of January and the 20th day of March of each year, (p. 273). This decree, in attempting to conform to the flow of the stream, provided for the taking of the flood waters during the late winter and early spring. The use of the water was at the rate of one inch to the acre and was so distributed under the decrees (pp. 164, 259). The average high water was 200 second feet, but of course at many times the water was higher than this for short intervals. Later on in

the season also, it dropped down to a low point, there being on an average only 53 second feet of water or 2,700 inches in the stream in the month of July for the irrigation of the 6,500 acres commonly irrigated (p. 99). It was sought to cover the water supply of the old settlers as completely as possible considering the nature of the flow of the stream. Deeds were taken for water amounting to 8,890 inches (p. 88), out of a total of 10,435 inches mentioned in the decree. The amount of unpurchased water represented occasional possibilities so far as the water supply was concerned and as it was considered that these had probably lapsed for non-use, water permits were taken out in the State Engineer's office to cover any water not represented by the conveyances made to the company by the old settlers. The unpurchased rights represented only occasional winter flood rights.

Appellants, in discussing the question of the old rights, go on further to say (p. 39 brief):

"Assuming that the court did not err in the particulars we have been discussing (in regard to the old rights), it did err we think as to the quantities of water granted under the so-called old rights and also erred with respect to the dates thereof."

Appellants then go on to discuss the area which was under cultivation and irrigation in Idaho, beginning with the year 1878 and running down to

the year 1888. Appellees having shown by the testimony that 12,000 acres of land had been patented by the settlers, that 6,500 acres were ordinarily irrigated, that this, in 1888, took the entire supply of the water, that all the ditches were then built and that water was used in all of them and that the conditions existed substantially without change from 1888 to 1908, we may properly look to see what the conditions were prior to 1888 (pp. 87, 88, 89, 164, 188, 192).

The settlement of the valley commenced in 1875, forty years before the trial of the case. All the early-day water rights were initiated more than twenty-five years before the trial. To find living witnesses who could testify to the facts at that early day is obviously almost out of the question. We may, therefore, look to the decrees which were rendered among the parties in that locality for information in regard to the priorities among them in addition to the oral testimony which was introduced.

We append the following table showing, first, the water rights granted in the first decree rendered in the year 1886 in the State court between some of the parties living in the valley in Idaho; also the priorities granted by the second decree, which included many more parties and comprehensively covered the entire Idaho situation. We next show the number of acres which the lower court found was irrigated in various years in this case, and this, translated into terms of inches, would give the amount of

water which the Court found they would be entitled to under the former conditions prior to the building of the new works:

Year.	Decree, 1886.	Decree, 1892	U. S. Court
1875	160	160	
1876	320	320	
1877	170	710	
1878		320	300
1879	320	320	100
1880	1,040	1,340	250
1881	2,680	2,625	850
1882	2,640	3,390	500
1883		100	3,000
1884	200	200	1,500
1885	620		
1886			
1887		180	
1888		150	
	<hr/> 8,150	<hr/> 10,315	<hr/> 6,500

The total amount of water rights acquired by deed by the Oakley Company amounted to 8,890 inches or 179 second feet (p. 88).

The early use of water and the early necessity for such use was an inch to the acre and this amount was given in the decrees. The testimony given in the court below shows that this amount was necessary (p. 196). This amount was the right to a continuous flow of an inch to the acre so long as it was found in the stream. The lower court did not

give us this right to which we were entitled under the evidence. The Court found that we had rights covering 6,500 acres (p. 279), but instead of giving us the right to which the evidence showed we were entitled, the Court limited the right during the season to 2 3-4 acre feet per acre. We think the Court was not justified in so limiting our right, particularly as the Court gave to the other side three acre feet for its hay and grain land (p. 283). This error of the Court against us abbreviated our old water rights. It cut them below the allowance which the Idaho court had given, but we find it set up in the brief of the appellants (p. 41 of brief) as an error against the appellants, when as a matter of fact it was a limitation on our right and an error against us. Under the new system of distribution of the water supply provided for under the new works, the settlers were entitled to 1 1-2 acre feet of water delivered within one-half mile of their headgate. It would take, of course, a very much larger amount delivered at the intake into the reservoir or at the point of diversion therefrom. The specific rights which the plaintiffs and appellees were entitled to were the rights to the flow of the stream to the extent of an inch to the acre continuously whenever such an amount could be found in the stream, the right being limited to 8,890 inches, the amount represented by the purchases of water rights made by appellees. In addition to this, we were entitled to divert the number of second feet provided for in the

water permits, subject, however, to any prior rights of the appellants. We did not go into the detail of canal losses in order to show just what amount of water it was necessary to divert in order to give 1 1-2 acre feet to the farmer measured at a point within one-half mile of the place of intended use (p. 34) for the reason that we had built works covering 50,000 acres of land (p. 71) and were entitled to divert water to cover this land under our contract with the State and under the agreement made between the State and the United States and under our contract with the settlers. As the flow of the stream had never exceeded 78,000 acre feet, it seemed unnecessary to go into those details because the total supply was obviously insufficient for the project as constructed. The old settlers were entitled from the year 1888 onwards to 6,500 inches of water whenever they could find it in the stream subject to small priorities on the part of the appellants. This right had been taken away from them by the decree of the Court and they are limited in the aggregate to 2 3-4 acre feet.

Much money has been spent in providing a reservoir to conserve the rights of the old settlers in order that these water rights might be better distributed in the time of year when the greatest use of water was required. The limitation cutting them down to 2 3-4 acre feet per acre is a serious abbreviation of the right to which they were already entitled. The limitation as to 2 3-4 acre feet is an

error against the appellees and not against the appellants. The duty of 1 1-2 acre feet per acre was provided under the new plan for an area of 50,000 acres, the water to be delivered at a point within one-half mile of the place of intended use, but this is of course not the same amount that would need to be diverted from the stream in order to make such a delivery nor is it the amount which would run into the reservoir. Seepage losses in reservoirs and canals vary from a minimum of twenty-five per cent up to fifty per cent or more, but we did not go into this phase of the matter on account of the obvious insufficiency of the water supply to cover the entire tract for which the works were built. It would be an excellent system indeed that could deliver to the settler at the half mile point sixty-five per cent of the water that ran into the reservoir. From 1888 onward the old settlers had diverted all of the waters in the stream subject to some appropriations made by appellants and their rights should have been protected in the decree. They should have been given the entire flow of the stream up to 6,500 inches at all periods of time during the year; in other words, a continuous flow as provided in the Idaho decrees.

The real complaint in this case was not against the old diversions of the Vineyard Company or its predecessors in interest, but against the new works which were built and the new diversions made after the building of the Oakley Company's project.

As to the distribution of the appropriations

through the various years on the Idaho lands prior to 1888, the testimony of Mr. Howells and Mr. Parkinson shows the following facts:

There were 300 acres farmed in 1878. In 1879, the acreage was 400 acres. In 1880, it was increased to a total of 700 down to 1881, that is, from 1878 down to and including 1880, there were 700 acres (p. 87). In 1882, there were 1,500 acres. In 1883, there were 2,000 acres (p. 89). The ditches were the same in 1882-3 up to 1900. Two canals were taken out in 1883, the East Canal or Emerson Canal, and the West Canal. Reference to the decrees in the State court show that 2,000 inches were awarded to the East Canal and 1,000 inches to the West Canal. The location and capacity of the ditches were the same in 1909 (when the new area was contracted for) as in 1888. There was very little change in the area of irrigated lands from 1888 onward. The irrigation of 6,500 acres was about the same between 1888 and 1909 (p. 88). In 1888 and subsequent years many of the ditches were able to carry more water than there was in the stream (p. 88). The company took conveyances of 8890 inches so as to include flood waters (p. 88).

The Court evidently considered the testimony of Howells and Parkinson and others in order to determine the rate of use of water, it being shown that 6,500 acres were irrigated in 1888 and that this area had been brought to a state of irrigation by the growth and development of the country beginning in

1875. The Court, on account of the ancient character of the facts, might properly look to these decrees for the purpose of in some respect informing itself as to the rate of development which had taken place in the country. Whether this was done we do not know.

With regard to the rights of the appellees, the appellants object on the further ground that the Court erred in decreeing to the appellees any of the waters of Goose Creek in excess of 30,000 acre feet (p. 62). They base this assignment of error upon the ground that in the year 1915 there were only 20,000 acres of land in cultivation upon the Oakley Project and that one and one-half acre feet for each acre of this ground would amount to 30,000 acre feet. They ignore, however, the fact that the measurement of the one and one-half acre feet of water must be at a point within one-half mile of the place of intended use and not at the point of diversion from the stream or at the point of inflow into the reservoir.

They quote Section 4621 of the Revised Codes, as amended (Chap. 35, Laws of 1913), to the effect:

“In allotting the waters of any stream by the District Court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied.”

That has been done in this case, the allotment being made for irrigation purposes. The statute further goes on:

“And when such water is used for irrigation, the right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land which is irrigated but such water and such right will pass with the conveyance of such land and such decree shall describe the land to which such water shall become appurtenant.”

This has been done in this case. The statute further provides:

“The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed; provided, that in the case of works capable of diverting more water than is applied to a beneficial purpose at the time the rights of the person or persons owning or using such works are adjudicated by the court, the right only to the water beneficially applied at the time of making such allotment shall be confirmed by the court and the court shall ascertain the amount of water which can be diverted through such works in excess of such quantity beneficially applied and shall set a time when such amount shall be applied to the beneficial purpose for which it is intended which time shall not exceed six years from the date of the decree issued by such court under such adjudication.”

The situation is peculiar. The diversion works consisted of two canals having a diversion capacity a little in excess of 500 second feet (p. 71). The total discharge of Goose Creek and its tributaries above the reservoir (p. 99) has been as follows:

In 1911, 49,170 acre feet.

In 1912, 74,000 acre feet.

In 1913, 50,915 acre feet.

In 1914, 64,740 acre feet.

The capacity of the reservoir (p. 24) was 70,000 acre feet. The project covered 50,000 acres (p. 71) so that it would take 75,000 acre feet measured at a point not farther distant than one-half mile of each quarter section of land (p. 28) in order to satisfy the terms of the contract. It would take much more than 75,000 acre feet of water in the reservoir to supply the land on account of seepage losses and transportation. This was not gone into for the reason, as before stated, that the supply at the point of diversion was insufficient for the area of lands under the works. The entire water supply had already been turned in and used upon the smaller area of land that was cultivated each year.

In 1913, there were 11,590 acres in cultivation.

In 1914, 17,234, and the amount in 1915 was estimated at 20,000 or 21,000 (p. 72).

The statute of the State mentioned with regard to decrees in water right cases must be taken in consideration, however, with other statutes relating especially to Carey Act Projects. Under the Carey Act, a water right for the entire project is taken out at the time of the presentation of the plan to the State Board of Land Commissioners (Sec. 1617, R. C.). The statute provides that the land shall be entered by settlers in tracts not to exceed 160 acres (Sec. 0000, R. C.). It also provides that each settler shall be entitled to a proportionate interest in

the water right taken out for the project (Sec. 1615, R. C.). In addition to this, that a water right contract must be secured by each settler entitling them to this water supply before an entry of the land can be made (Sec. 1626, R. C.) and the water right is made appurtenant to the land. The settler is only required to cultivate one-eighth of his land in order to make final proof (Sec. 1628, R. C.). The settler is given three years after his settlement in which to make his final proof (Sec. 1628, R. C.). There is no provision of the statute specifying the period in which the Carey Act settlers must cultivate his entire area of land. Under the statute cited by appellants and above quoted, the right only to the water beneficially applied at the time of the making of the allotment is to be confirmed by the Court. Now, in this case, the works were too large for the stream. The canals would divert in excess of 500 second feet and the reservoir would impound 70,000 acre feet of water. The amount of water which the stream discharged varied from 49,170 acre feet in 1911 to 74,000 acre feet in 1912, but this water was used on the area which was in cultivation in those years, the seepage losses in new works and new reservoirs being large. All the water therefore in the stream was beneficially applied at the time of making the allotment and this varied in different years. While it is true that the works are capable of diverting more water than had been applied to beneficial use, still, all the water in the stream had been beneficially used upon

the project and there was no occasion for the Court to set a time when the excess amount of water which might be diverted in the system should be applied to beneficial purposes. If such a condition should arise, it would be covered, of course, by the statute. The seepage losses in new works are very great; they gradually decrease. Ultimately, the existing water supply will be stretched out over an additional acreage of land. Apparently it can never cover, however, the area of 50,000 acres originally jurisdiction so that it may make any changes of this character necessary to meet new conditions. The statute cited applies to cases where the works are built but at the time of the decree only part of the water is used. As to the remainder the further time provided by the statute is to be given. But that is not this case. *This statute is modified by Law 1915 p. 1*

It is claimed by appellant that the Court erred with respect to the quantities of water awarded to the Vineyard Company and with respect to the dates to which said rights relate. The evidence upon this point was conflicting.

The testimony with regard to the area irrigated on the Grandee ranch may be summarized from the testimony of the witnesses as follows:

McClelland (1889), 428.2 acres (p. 106).

Gamble (1889), 405 acres (p. 141-2).

Mortensen (1913), 300 acres (p. 130-2).

Martin (1912), 180 to 250 acres (p. 153).

Boren, 260 to 270 acres.

The above statements relate to different periods of time as will be found by reference to the testimony running all the way from 1889 down to 1909.

The testimony on the Winecup Ranch may be summarized as follows:

McClelland (1889), 269.2 acres (p. 124).

Way (1915), 451.2 acres (p. 126-7).

Gamble (1886), 120 acres (p. 142).

Mortensen (1913), 200 acres (p. 130).

Martin (1896-1912), 50 acres (p. 151).

Worthington (1894), 35 to 50 acres (p. 156).

Bedke (1899), 50 acres (p. 158).

The testimony on the Spring Creek Ranch may be summarized as follows:

Gamble (1904), 45 acres (p. 143).

Martin (1912), 10 acres (p. 152).

The rules applying to the use of water in cases of this kind seem to be well settled by the courts. In the first place, the use of water must be a reasonable use

In a case in the Federal Court of Nevada, it was said:

“Under the principles of prior appropriation, the law was well settled that the right of water flowing in the public streams must be acquired by an actual appropriation of the water for a beneficial use; that if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land by making a reasonable use of the water.”

Union M. & M. Co. v. Dangberg, 81 Fed. 73.

Dick v. Caldwell, 14 Nev. 167.

Simpson v. Williams, 17 Nev. 432.

Ditches built for the holding of water rights are of no real value for that purpose, as was said in a Nevada case:

“If the capacity of his ditches is greater than is necessary to irrigate his farming land, he must be restricted to the quantity needed for the purpose of irrigation, for watering his stock and for domestic purposes.”

Barnes v. Sabron, 10 Nev. 217.

The amount of water that a water user has been in the habit of applying to his lands is not the true test. The question to be determined is the amount actually necessary.

Farmers Co-Operative Ditch Co. v. Riverside Irrigation District, 16 Ida. 525.

The witness Franklin (p. 178) says that, under the present condition of the lands, no method other than the flooding method could be used because they are in their natural condition.

In determining the duty of water, reference should always be had to lands that have been reduced to a reasonably good condition for irrigation.

Farmers Co-Operative Ditch Co. v. Riverside Irrigation Co. 16 Ida. 525.

Under Section 4676 of the 1911 compilation of the laws of Nevada, the maximum quantity of water in localities where it cannot be used for a period of more than six months is three acre feet.

This has been the law of Nevada since 1903.

Laws Nevada, 1903, p. 24.

Under the Irrigation Laws of 1913, page 192, it is provided, under Section 4 of the act, that all water used in the State for beneficial purposes shall remain appurtenant to the place of use, provided, that if for any reason it should become impracticable to beneficially use the water at the place to which it is appurtenant, it may be transferred to some other place provided the rights of other persons are not affected.

Section 11 of this act provides that where water is diverted for direct irrigation not to exceed .01 of one cubic foot per second for each acre of land should be allowed.

It would therefore seem that the appellant has received in this case all that the law would permit and apparently something in excess thereof, for they have been permitted to divert water at a rate in excess of .01 of a second foot per acre.

It is some times said that a suit of this character is *sui generis*, being sometimes considered as an action in rem and sometimes as an action in personam.

Kinney on Irrigation, Sec. 1634.

The appellant claims that the Court erred with respect to the provisions of the decree intended to operate upon property and rights and to regulate the internal affairs of the appellant in a foreign

State. The right to maintain this suit is fully established by the decisions.

Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11.

Willey v. Decker, 11 Wyo. 496.

Taylor v. Hulett, 15 Ida. 255.

Anderson v. Bassman, 140 Fed. 14.

Rickey L. & C. Co. v. Miller & Lux, 218 U. S. 258.

A court of equity has power by its decree to reach the ends of justice and it may make such a decree in a water suit as will be productive of that result.

Union M. & M. Co. v. Dangberg, 81 Fed. 73 (p. 121).

Conrad Investment Co. v. United States, 161 Fed. 829.

Gutierrez v. Wege, 145 Cal. 730.

Simkins Federal Equity (3rd Ed.), p. 588 and cases there cited.

The measuring devices required by the Court were not alone for the information of the appellees, but were for the information of the appellants and the Court as well in order that there might be an orderly method of determining the amount of water used. The Court did not attempt to take undue liberty with the statutes of Nevada with regard to the distribution of the water.

Under Section 54 of the Nevada law (quoted on p. 79 of brief), it is the duty of the State Engineer

to follow and obey the decrees of the Court, but the Nevada statute does not do away with the right of the Court to provide reasonable and proper methods for the determination of the right to the use of water under a decree rendered by the Court. A decree in a water case which did not provide for an efficient method of handling the water supply and determining the amount used would have little value to any of the parties engaged in the litigation.

As to the point made that there should be no relief against the Utah Construction Company, we say that it appears that the Utah Construction Company was the owner of a large proportion of the stock of the Vineyard Company; in other words, the Vineyard Company is a subsidiary of the Utah Construction Company which is in a position to control its conduct. While the Utah Construction Company might not have been a necessary party to the suit, still, it was a proper party and it should not be permitted to direct the doing of things by the Vineyard Company which that company under the decree is forbidden to do. Further than this, the decree does not go.

In conclusion, we submit that the errors committed by the Court below were errors against the appellees rather than against the appellants and that upon this appeal the judgment should be affirmed.

Respectfully submitted,

SAMUEL H. HAYS,

P. B. CARTER,

Solicitors for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Appellant,
vs.
W. H. REID,
Appellee.

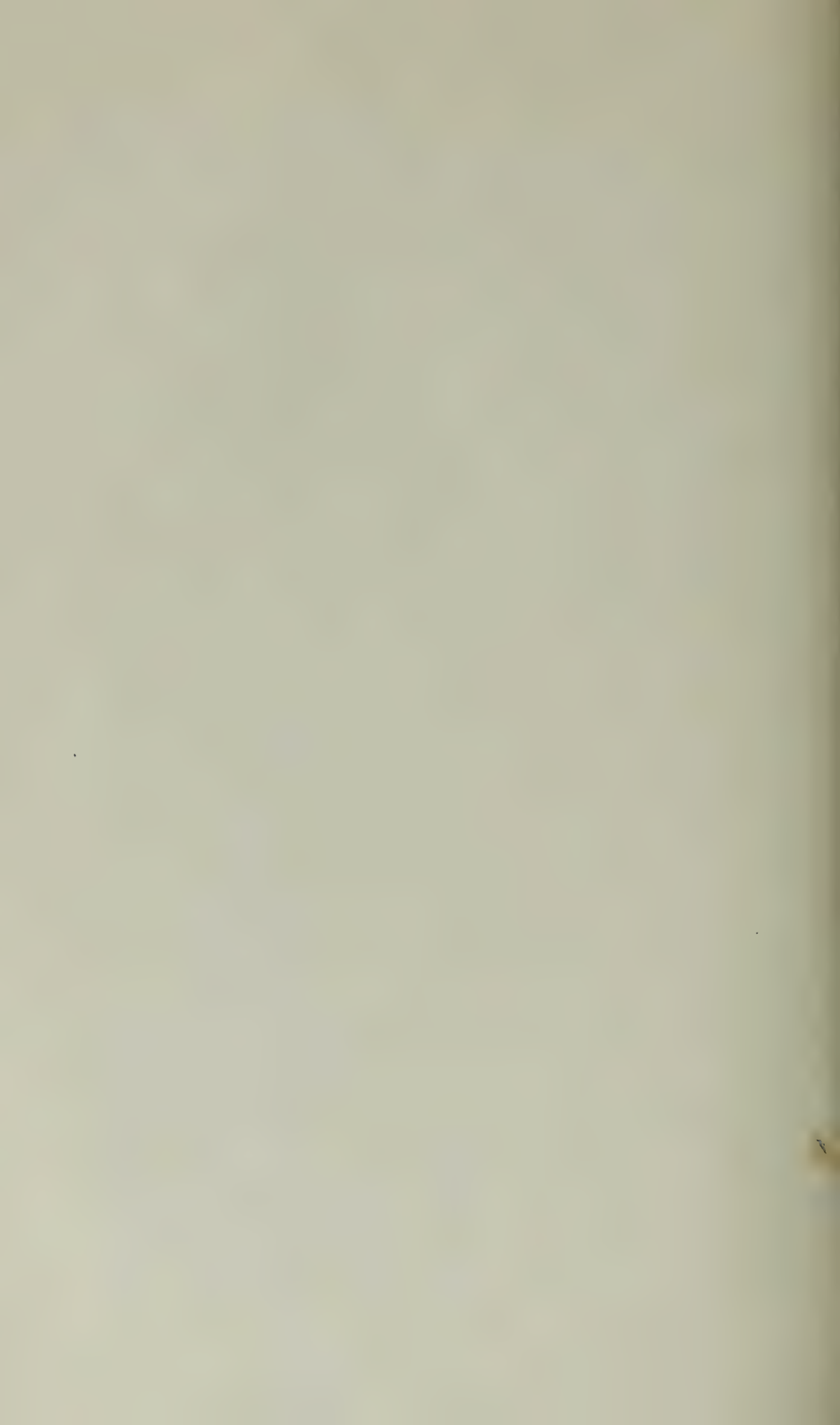
Transcript of Record.

Upon Appeal from the United States District Court for the
Eastern District of Washington, Northern Division.

Filed

JAN 16 1917

F. D. Monckton,
Clerk.



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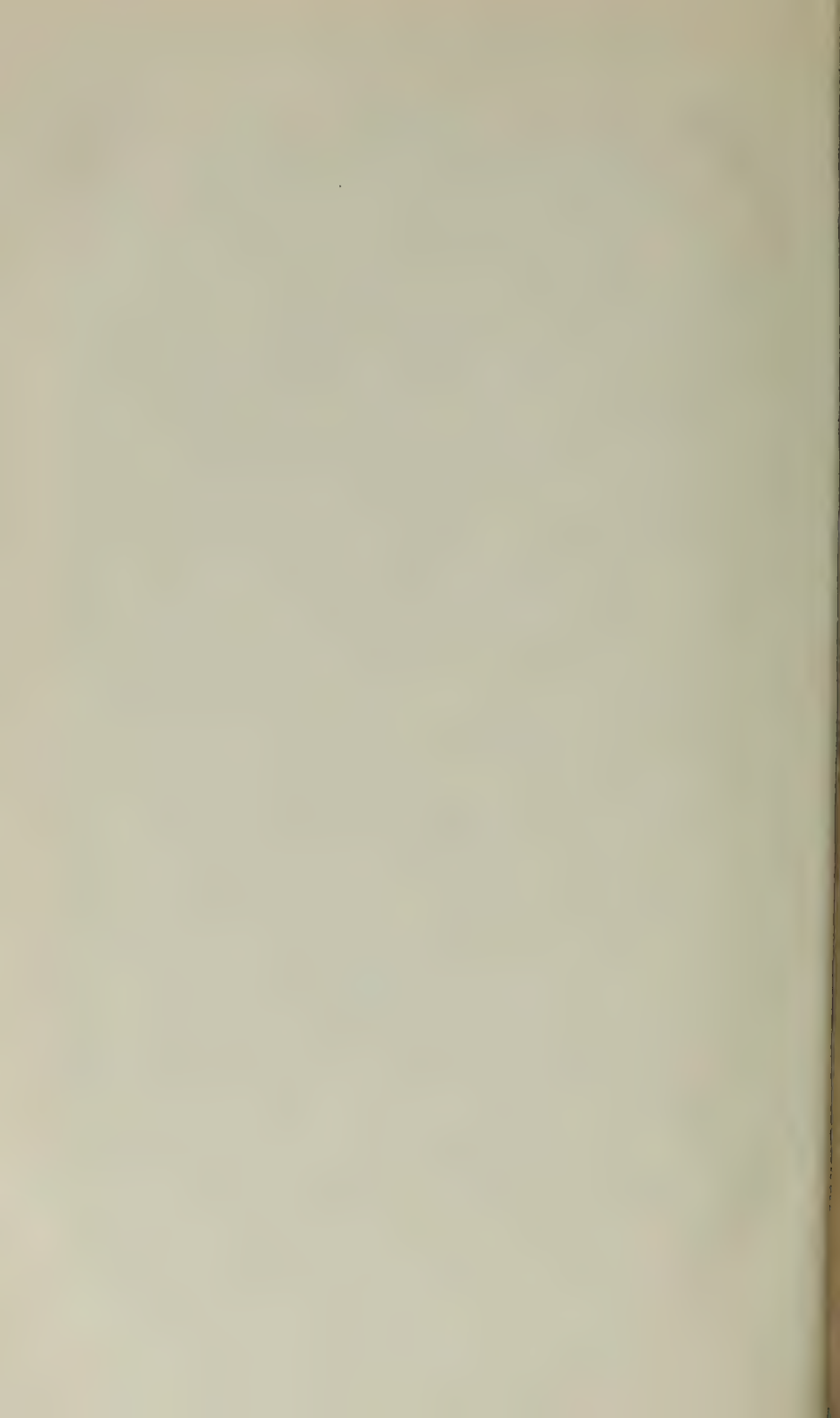
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and

CHARLES S. ALBERT and THOMAS BALMER,
Great Northern Passenger Station, Spokane,
Washington,

Attorneys for Defendant and Appellant.

[2*]

*In the District Court of the United States for the
Eastern District of Washington, Northern Divi-
sion.*

No. 2545.

W. J. REID,

Complainant,

vs.

THE GREAT NORTHERN RAILWAY COM-
PANY, a Corporation,

Defendant.

Bill in Equity.

To the Judges of the District Court of the United
States, for the Eastern District of Washington,
Northern Division:

W. J. Reid, a resident and citizen of the State of
Washington, brings this, his bill, against the Great
Northern Railway Company, a corporation, organ-

*Page-number appearing at foot of page of original certified Transcript
of Record.

ized and existing under and by virtue of the laws of the State of Minnesota.

And thereupon your orator complains and says:

I.

That your orator is a citizen of the United States, and is a resident and citizen of the State of Washington, residing at Spokane, in Spokane County, State of Washington, and in the Northern Division of the Eastern District of Washington aforesaid.

II.

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and is a citizen and resident of the said State of Minnesota.

III.

That the defendant now is and has been continuously for more than two years last past a railroad corporation, created and existing under and by virtue of the laws of the State of Minnesota, and was at all times hereinafter mentioned conducting and carrying on a general transportation business of freight and passengers between and within the states of Minnesota, North Dakota, Montana, [3] Idaho and Washington and engaged in interstate commerce, and is the owner and sole lessee of that railroad known as the Great Northern Railway.

IV.

That on the 10th day of May, 1915, the Great Northern Railway Company was operating on the line and track of its railroad in Montana, a work train used in repair of said road being so operated in interstate commerce.

V.

That on said day near the station of Geyser, in the State of Montana, while your orator was at work as a cook on said work train so engaged in interstate commerce, as aforesaid, and in the cook-car thereof owned and operated by the defendant, the Great Northern Railway Company, and while your orator was in the employ of the defendant, the Great Northern Railway Company as aforesaid, said defendant company caused to be transported the car upon which your orator was fulfilling his duties as a cook as aforesaid, along the main track of the defendant as aforesaid, where a switch-track of said defendant left the main track of said defendant near Geyser, Montana, as aforesaid; that the switch point on said switch-track was old, defective and worn, which defect was known to the defendant or by the exercise of ordinary care and caution could have been known to the defendant; that the defendant further carelessly and negligently failed to properly fasten the switch point on said switch-track so leading off from the main track, as aforesaid, but carelessly and negligently allowed the same to remain partially open and insecure, and that said defendant, its agents and servants, so carelessly, negligently and unskillfully ran and operated said train on said date as aforesaid, at said place as aforesaid, along the main track and over the switch and switch point so leading from the main track as aforesaid that said cook-car on which your orator was riding as aforesaid was caused to be [4] and was derailed, and that your orator was thrown about said car in a violent manner; said de-

railment of said car as aforesaid causing the top of the cook-stove in said car as aforesaid to fall upon your orator's right foot and causing your orator to be thrown against the side of said car.

VI.

That as a direct and proximate result of said car leaving the track and your orator being violently thrown about said car, and said top of said cook-stove falling upon your orator's foot, your orator has suffered a double inguinal hernia, a broken arch of the right foot, a severe wrench of the back and a severe shock to his nervous system. That since said injuries your orator has suffered great and excruciating physical pains and agony and on account thereof has suffered a semi-paralyzed condition of both legs. And your orator does now suffer and in all probability will continue so to suffer during the rest of his natural life.

VII.

That prior to the time of the injuries complained of, your orator has been and was an absolutely well man, save and except for a very small rupture on the right side, and he had never lost a day's work on account of his health, and was capable and was earning from \$75 to \$100 per month and expenses. Your orator at the time of the injuries was of the age of forty-two (42) years and had a life expectancy of twenty-six (26) years.

VIII.

That since said injuries as heretofore stated, your orator has been unable to work save and except from time to time when absolute necessity demanded he has been able to work for a week or two at a time at

a wage of not to exceed twelve dollars (\$12) per week.

IX.

That since said injuries as heretofore stated, your orator [5] has been in very poor health, and your orator alleges that his injuries are permanent and that he will never be able as before sustaining them to earn his livelihood and your orator claims that he has been damaged in the reasonable sum of fifteen thousand dollars (\$15,000).

X.

That on account of the injuries as heretofore stated, your orator has had to expend or will have to expend the sum of one hundred fifty dollars (\$150) or more for physicians and for care and medical supplies, and in excess of the ten dollars (\$10) received from the defendant.

XI.

That on the day of the accident to your orator, in this his bill hereinbefore set forth, your orator while sick, injured, in an exhausted condition and affected with nausea, and not in the full possession of his faculties, and while your orator was in said mental and physical condition, a claim agent of the defendant herein, whose name is to your orator unknown, took your orator to the office of the defendant's physician and surgeon, in the town of Great Falls, Montana, whose name is to your orator unknown, and upon examination by said physician, whose name is to your orator unknown as aforesaid, and after an apparent and cursory examination by said physician of the defendant, said physician informed your orator that his injuries were slight and amounted to

nothing more than a nervous shock and a slightly sprained ankle and instep, and that in a day or two, he, your orator, would be entirely recovered, and that he, the claim agent representing the defendant would give your orator the sum of ten dollars (\$10), representing two or three days' pay, that he, your orator, might remain in the town of Great Falls, Montana, for two or three days and rest, and receive treatment if necessary, and that the defendant would hold open his, your orator's, position with said company, and that your orator accepted from the defendant the [6] sum of ten dollars (\$10) that he might so do, and for no other purpose; that at said time while your orator was in the nervous condition and not in the full possession of his faculties as aforesaid, your orator signed under the representation and dictation of the claim agent of the defendant an instrument which said claim agent of the defendant stated was a receipt for the ten dollars (\$10), and also your orator endorsed a voucher for ten dollars (\$10), whereupon said claim agent of the defendant gave your orator the sum of ten dollars (\$10) for the purpose of paying his expenses and his time for two or three days, when he would be able to go back to work as heretofore pleaded.

XII.

. That then and there relying upon the statements of said claim agent and physician, your orator did then and there sign said paper.

XIII.

That your orator did not read said paper, that he was not in such a physical and mental condition that he could read and comprehend the contents

thereof; that he did not have time to read said paper and that he signed said paper relying solely and wholly upon the statements of said claim agent and physician of the defendant, that it was a receipt for ten dollars (\$10) as aforesaid and nothing else, and that he, your orator, would not have signed said paper save and except for the representations as to its contents then and there made to him by the defendant's claim agent, and that said statements were then and there made by the defendant's claim agent to your orator, for the purpose of inducing your orator to sign said paper.

XIV.

That said paper as aforesaid was the only paper signed by your orator on the 10th day of May, 1915, or any time subsequent thereto save and except a voucher aforesaid. [7]

XV.

That if said paper then and there signed by your orator as aforesaid, was the paper set out in the Answer herein and the same paper to which said claim agent procured your orator's signature, your orator's signature thereto was obtained through fraud, misrepresentation and deception as aforesaid, as to the contents of said paper as aforesaid, that your orator did not then nor has he ever at any time executed or authorized to be executed to the defendant corporation or to any other person or persons whomsoever, any release of his claim for damages for injuries to his person sustained as in the complaint herein set forth.

XVI.

That at no time on said 10th day of May, 1915, or

at any time subsequent to the receiving of said injuries, did said claim agent or any other person or persons representing the defendant, ever discuss with your orator the subject of the settlement of his claim for damages for personal injuries as set forth in the Complaint herein, nor had your orator at any time presented a claim for settlement to the defendant or any agent or agents thereof, for the personal injuries heretofore alleged.

XVII.

That your orator is informed and believes, and upon such information alleges the fact to be that the defendant herein has in its possession a certain instrument in writing, in words, letters and figures as follows, to wit:

“GREAT NORTHERN RAILWAY COMPANY,
RELEASE OF DAMAGES.

KNOW ALL MEN BY THESE PRESENTS,
That in consideration of the sum of ten and no/100 dollars to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, have released, acquitted and discharged, and do, by these presents, release, acquit and discharge said Railway Company, its successors and assigns of and from any and all liability, causes of action, costs, charges, claims or demands of every name and nature, in any manner arising or growing out of, or to arise or grow out of [8] personal injuries received by me (W. J. Reid) at or near Geyser, in the State of Montana, on or about the 10th day of May, 1915, while acting as a cook, I met with an accident whereby I sustained personal injuries; or arising, or to arise out of any and all personal

injuries sustained by me at any time or place while in the employ of said Railway Company prior to the date of these presents.

No promise of future employment has been made to me by said Railway Company as part consideration of this settlement and release, or otherwise.

In witness whereof, I have hereunto set my hand and seal this 10th day of May, A. D. 1915.

W. J. REID. (Seal)

In presence of:

P. B. FOLEY.

W. J. BURTON."

"VOUCHER.

GREAT NORTHERN RAILWAY COMPANY.

To W. J. Reid, Cook, Dr.

Address, Geyser, Montana.

Please date and sign receipt and return to Assistant Treasurer, St. Paul, Minn.

For and in consideration of any and all claims past, present and prospective against the Great Northern Railway Company arising or to grow out of personal injuries received by me at or near Geyser, Montana, on or about May 10th, 1915. \$10.00

I certify that the above is a true copy of an original account approved by the proper officers, that the same has been examined, found correct, registered and filed in the Accounting Department of the Company.

J. H. BOYD,
Auditor Disbursements.

Treasurer's Voucher made ———, 191——, by
_____.

Received May 10th, 1915, of the Great Northern Railway Co., Ten and no/100 Dollars in full for the above account.

\$10.00. (Sign here) W. J. REID."

Endorsed on the back is the following:

"GREAT NORTHERN RAILWAY COMPANY.

Voucher No. J289. Comptroller's No. 24278.
Month of May, 1915. In favor of W. J. Reid, Cook,
Geyser, Montana.

\$10.00. [9]

Approved for payment.

G. R. MARTIN,
Comptroller.

Paid by draft No. 18845. Drawn by P. B. Foley,
A. C. A., Great Falls, Mont.

Treasurer's Office. Paid May 18, 1915. G. N.
Ry. Co."

Endorsed on the back of the release is the follow-
ing:

"I have read within Release before signing and
fully understand that the sum of ten dollars is in
full settlement of all claim of every kind.

W. J. REID.

Witness:

P. B. FOLEY.

W. J. BURTON."

XVIII.

That by reason of and on account of the physical
and mental condition of your orator at the time here-
inbefore set forth, your orator is unable to state
whether said release is the paper signed by him as

aforesaid, and he has no knowledge thereof, and he is unable to state whether, if he did sign said paper, that said paper is in the same condition as it was when he signed the same, and whether the written and typewritten portions of said release were in said paper at the time he signed the same, or whether other and different matters were therein contained.

XIX.

That at the time hereinbefore set forth, to wit, immediately after the accident and within eight (8) hours of said accident to your orator herein, your orator was not aware that in said accident as aforesaid, he, your orator, had broken the arch of his right foot or had suffered double inguinal hernias or any injury of any kind, character or description, or that he had sustained any other injury of any kind, character or description, or which might cause a broken arch of the right foot or a double inguinal hernias, or which might cause any other disability to your orator's earning power, and that the said injuries, as aforesaid, [10] to your orator were never taken into consideration at the time of signing said instrument by your orator, if the same was so signed, nor by the claim agent or vice-principal of the defendant corporation at said time within the knowledge of your orator, nor by the defendant corporation with the knowledge of your orator herein. .

XX.

That your orator further alleges and says that heretofore he, your orator, instituted an action against the defendant corporation in the District Court of the United States for and within the Eastern District of Washington, Northern Division, for

and on account of his injuries as aforesaid, and by the prayer of his complaint in said action sought to recover of and from the defendant corporation the sum of fifteen thousand dollars (\$15,000) and costs for and on account of his injuries as aforesaid.

XXI.

That after such proceedings were had in said court, the defendant corporation filed an Answer in said cause, in which Answer the execution of the alleged release hereinbefore set forth was alleged as a release from any and all claims of any kind, character or description of your orator against said defendant corporation and as a bar to the prosecution of his, your orator's, said action, to which release your orator interposed a reply, denying the execution thereof, and pleading that said release was obtained from him, your orator, if obtained at all, by fraud and misrepresentation, reference to which complaint, answer and reply are hereby prayed by your orator for fuller particulars as to their contents.

XXII.

That thereafter and prior to the institution of this action your orator tendered to the defendant the sum of eleven dollars (\$11), being the sum of ten dollars (\$10) paid your orator by said defendant, and interest thereon from the date of said [11] payment and up to the time of said tender, at the rate of ten per cent (10%) per annum, which tender was refused by said defendant corporation, who refused to accept said sum of money or any portion thereof, and that your orator has always kept said tender good and willing and ready to pay said amount to

said defendant corporation, and hereby tenders and deposits in the registry of this court for the benefit of said corporation the said sum of eleven dollars (\$11).

XXIII.

That the amount in controversy herein, to wit, the injuries sustained by your orator, as aforesaid, exceeds the sum of two thousand dollars (\$2,000) exclusive of interest and costs.

WHEREFORE, your orator brings this suit to set aside said release and to have the same declared null and void, and prays:

I.

That the said defendant may be compelled to answer all and singular the premises and allegations in this bill, but not under oath, (answer under oath being hereby expressly waived), and that relief be ordered and decreed to your orator as follows:

That the aforesaid release hereinbefore set forth was and is null and void; that the same was executed, if executed at all by the complainant, for and on account of fraud and misrepresentation of the defendant, its servants, agents and employees, and for and on account of the lack of knowledge by complainant and by defendant, its servants, agents and employees, that said accident and injuries broke the arch of the right foot and cause a double inguinal hernias, and that said injuries were permanent, or that complainant's earning power has been permanently destroyed, and for such other and further relief as may be meet and agreeable to equity, and for his costs of this suit.

And your orator further prays that your honors

will grant to your orator a writ of subpoena of the United States of America, [12] issuing out of, and under the seal of this court, and directed to the said Great Northern Railway Company, a corporation, demanding it on a day certain to appear before your Honors in the court aforesaid, and then and there answer this bill, and these premises, and to abide by and perform the further order, decree and direction of this court.

(Signed) STEAKE & NUZUM,
Solicitors and Counsel for Complainant: Address
11-12 Ziegler Block, Spokane, Washington.

State of Washington,
County of Spokane,—ss.

W. J. Reid, being first duly sworn, on oath states that he is the complainant in the above-entitled cause; that he has heard read the foregoing Bill of Complaint; knows the contents thereof, and believes the same to be true.

(Signed) W. J. REID.

Subscribed and sworn to before me this 6th day of July, 1916.

(Signed) HAROLD N. NUZUM,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

[Endorsements]: Bill of Complaint. Filed in the U. S. District Court for the Eastern District of Washington. July 7, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [13]

[Title of Court and Cause.]

Answer to Bill in Equity.

Now comes the above-named defendant for its answer to the Bill of Complaint of the above-named plaintiff.

I.

Denies any knowledge or information sufficient upon which to form a belief as to the truth or allegations of paragraph I of the Bill of Complaint herein, and therefore denies the same.

II.

Admits the allegations of paragraph II of said bill.

III.

Admits the allegations of paragraph III of said bill, except that said defendant alleges that at some times and places it is engaged in interstate commerce and at other times and places in intrastate commerce and alleges that it is the owner of the railroad known as the Great Northern Railway.

IV.

Said defendant admits that on the 10th day of May, 1915, the said defendant was engaged in operating a train of outfit cars at Geyser, Montana, but denies that said train was used in the repair of said road, or that it was operated in interstate commerce.

V.

Said defendant admits that upon said day the said plaintiff was employed as a cook in one of said outfit cars, and that while said car was being moved upon

the industry track of said [16] defendant, said car was derailed, and that said plaintiff received some slight injuries at the time of said derailment. Said defendant specifically denies that said derailment occurred upon the main track of said station at Geyser, and specifically denies that the switch point on the switch-track was old, defective or worn or that defendant negligently failed to fasten the switch point of said switch-track or negligently allowed the same to remain partially open or insecure, or that it negligently operated said train on said date at said place.

VI.

Said defendant denies that by reason of said derailment the top of the cook-stove fell upon the plaintiff's foot or that the plaintiff suffered a double inguinal hernia, or a broken arch of his right foot, or a severe wrench of his back or a severe shock to his nervous system, and denies that since said date plaintiff has suffered great and excruciating physical pains or agony on account of any injuries received upon said date, or that he has suffered a semi-paralyzed condition of both legs, or that he does now suffer or in any probability will continue to suffer any pain or agony on account of any injuries received upon said date.

VII.

Said defendant specifically denies that prior to said date said plaintiff was a well man; denies that he has never lost a day's work on account of his health, and denies that he was capable, or was earning from \$75 to \$100 per month and expenses. Said

defendant denies any knowledge or information sufficient upon which to form a belief that upon said date plaintiff was of the age of forty-two years, or had a life expectancy of twenty-six years, and therefore denies the same.

VIII.

Said defendant denies that since said date the said plaintiff has been unable to work or that he has not been able to [17] work for more than a week or two at a time, or that he has not been able to work for a wage not to exceed \$12 per week.

IX.

Said defendant denies that since said injuries the complainant has been in any other state of health than he was before the said injuries, and denies that the said injuries received upon the said accident are or were permanent; denies there will be any difference in his ability due to said injuries than before, to earn his livelihood, or that he has been damaged in the sum of \$15,000 or in any sum by reason of said injuries.

X.

Said defendant denies that plaintiff had to expend or will have to expend the sum of \$150, or any sum, for physicians or for care or medical supplies on account of said injuries.

XI.

Said defendant admits that upon the 10th day of May, 1915, the said plaintiff in company with a claim agent of defendant, went to the office of a physician and surgeon in Great Falls, Montana, and upon examination by said physician of said plain-

tiff, which said examination was a thorough examination, the said physician did find that the said plaintiff had suffered a bruise to his arm and shoulder, and some slight injuries to his ankle, and informed the said plaintiff to that effect, and that thereupon said plaintiff did claim to said defendant that said plaintiff's injuries received by him at the time and place alleged in said complaint, were injuries for which the said defendant was liable; that said claim was denied by said defendant, and through and by subsequent negotiations between said plaintiff and said defendant, a compromise and settlement of said claim was agreed upon and that upon the 10th day of May, 1915, said plaintiff did compromise, adjust and settle all the claims of said plaintiff against said defendant, on account of the injuries to said plaintiff, either as alleged in said [18] complaint or otherwise, and that at said time, in consideration of ten dollars paid by said defendant to said plaintiff, said plaintiff did then and there release, acquit and forever discharge said defendant of and from any and all liability, causes of action, costs, charges, claims or demands of every name and nature, in any manner arising or growing out of, or to arise or grow out of the personal injuries received by the said plaintiff, either as alleged in the third amended complaint in the action referred to in the complaint in this action or otherwise, and did release and discharge said defendant from any and all liability for or on account of the said injuries to the said plaintiff, and in accordance with said compromise, adjustment and settlement,

said defendant did pay to the said plaintiff the sum of ten dollars (\$10), and thereby the cause of action set up in the complaint and in the action referred to in the complaint was compromised, settled and adjusted; that in consideration of said sum of ten dollars (\$10) so paid by said defendant to said plaintiff, said plaintiff did in writing, under seal, release, acquit and forever discharge the said defendant from any and all liability, for or on account of the injuries to the said plaintiff, or from any or all cause or causes of action, charges, costs, claims or demands, of whatever name or nature, in any manner arising or to grow out of said injuries, which release of damages by said plaintiff to said defendant was duly executed and signed by said plaintiff under his seal, in accordance with said compromise and settlement, and which said release was duly delivered by said plaintiff to said defendant.

Further answering said complaint and said paragraph XI thereof, the defendant denies that at the time of said examination plaintiff was sick or was in an exhausted condition or affected with nausea or not in full possession of his faculties; that said examination was an apparent or cursory examination, or that the representations made by the said defendant to the said plaintiff [19] were other than those hereinbefore set forth, or that the said sum of ten dollars (\$10) was accepted by said plaintiff for any other purpose than the release and voucher set forth, or that said release or voucher were executed while the plaintiff was in a nervous condition, or not in full possession of his faculties.

XII.

Said defendant denies that the said release and voucher were signed by the said plaintiff relying upon the statement of the claim agent or physician hereinabove referred to.

XIII.

Said defendant denies that said plaintiff did not read said paper and that he was not in a physical condition that he could read or comprehend the intention thereof, and alleges on the contrary that plaintiff did read the said paper and that he fully understood the contents thereof. Defendant denies that said plaintiff signed said paper relying solely or wholly upon the statements of said claim agent and physician of the defendant, that it was a receipt and nothing else, and said defendant alleges that said claim agent and physician of the defendant made no such statement. Said defendant denies that the said plaintiff would not have signed said paper except for representation as to its contents made to him by the defendant's claim agent, or that the statements alleged to have been in said complaint were made by defendant's claim agent either for the purpose of inducing him to sign said paper, or otherwise.

XIV.

Said defendant specifically denies that the papers referred to in paragraphs XI to XIV, inclusive, in said complaint, were the only papers signed by said plaintiff on the 10th day of May, 1915, or any time subsequent thereto, except the voucher therein referred to, and alleges on the contrary that said

plaintiff did execute an original and duplicate of said release, and an original and duplicate of said voucher and did endorse a draft for [20] the sum of ten dollars (\$10), payable to the order of the said plaintiff and did cash the same, and received the money thereon, which draft was in the sum of ten dollars (\$10), and dated the 10th day of May, 1915.

XV.

Said defendant specifically denies that said release and voucher, or any of the papers signed by the said plaintiff, or the signature thereon of the said plaintiff, were procured through fraud or misrepresentation or deceit as to the contents thereof; alleges that said plaintiff executed and delivered to the said defendant a release of his claim for damages for injuries to his person sustained upon said 10th day of May, 1915.

XVI.

Said defendant alleges upon the said 10th day of May, 1915, that the said plaintiff did present a claim to said defendant for his injuries received upon said 10th day of May, 1915, and that the said plaintiff and said claim agent did discuss settlement of plaintiff's claim for damages for personal injuries received upon said 10th day of May, 1915.

XVII.

Said defendant admits all of the allegations in paragraph XVII of said complaint.

XVIII.

Said defendant denies that the said plaintiff has no knowledge or is unable to state whether the papers referred to in said paragraph XVII of the

complaint are the papers signed by him, said defendant alleges that the said papers are in the same condition as when signed by him, except as to said voucher, the name endorsed on the face thereof being "J. H. Boyd" and upon the back thereof the following: "J289, 24278, May 15, G. R. Martin, Treas., Office, paid May 18, 1915, Great Northern Railway Company, pay First National Bank, St. Paul, or order, express remittance, 14, [21] May 15, 1915,—14, L. E. Katzenbach, L. E. Katzenbach, Treasurer, Great Northern Express Company, First National Bank, May 17, 1915," were not upon the said voucher at the time that the said plaintiff did sign the same.

XIX.

Said defendant admits that said plaintiff did not know, within eight hours of said accident that he had broken the arch of his right foot, or had suffered a double inguinal hernia on account of said accident, and alleges that he did not suffer such injuries, or any injuries other than hereinbefore admitted in this answer. Said defendant alleges that all injuries suffered by said plaintiff upon said day were taken into consideration by the said plaintiff and the said defendant, its agents, servants or employees at the time said release and said other papers were signed.

XX.

Said defendant admits the allegations of paragraph XX of said complaint.

XXI.

Said defendant admits the allegations of paragraph XXI of said complaint.

XXII.

Said defendant admits the tender referred to in paragraph XXII of said complaint and the refusal thereof by said defendant.

XXIII.

Said defendant denies the allegations of paragraph XXIII of said complaint.

XXIV.

Said defendant specifically denies each and every allegation, matter and thing of said complaint, except as hereinbefore admitted.

XXV.

Said defendant denies that plaintiff is entitled to any [22] relief whatsoever, or any part of the relief in said Bill of Complaint demanded, and alleges that said complainant has no standing in this court, or any court of equity.

Said defendant prays in all things the same benefit and advantages of this its answer as if it pleaded or demurred to said Bill of Complaint.

Defendant denies all and all manner of unlawful acts whatsoever, whereof it is in any wise by the said Bill of Complaint charged; all of which matters and things this defendant is ready and willing to prove as this Honorable Court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) GREAT NORTHERN RAIL-
WAY COMPANY.

By CHARLES S. ALBERT and
THOMAS BALMER,

Its Solicitors and Counsel.

State of Washington,
County of Spokane,—ss.

Charles S. Albert, being duly sworn, on oath says: That he is one of the attorneys for the defendant, Great Northern Railway Company, in the above-entitled case; that he has read the foregoing answer; knows the contents thereof; and he believes the same to be true.

That defendant is a foreign corporation, is not within said county, is incapable of making the affidavit of verification herein, is absent from said county, and has no officer within the same authorized to make the verification, other than its attorneys, one of whom is affiant, who is duly authorized so to do and that the reason for this affiant making this verification is hereinbefore immediately set forth.

(Signed) CHARLES S. ALBERT.

Subscribed and sworn to before me this 24th day of July, [23] 1916.

[Seal] (Signed) HERBERT H. SIELER,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

State of Washington,
County of Spokane,—ss.

Herbert H. Sieler, being first duly sworn, on oath says that he is now, and during all the times mentioned herein has been, over the age of 21 years and competent to be a witness in the above-entitled action; that he is not a party to the above-entitled action; that upon the 29th day of July, 1916, at the hour of 1:05 o'clock in the afternoon, he served the

within answer upon Steake & Nuzum, the attorneys for the plaintiff herein, personally, by handing to and leaving with Gyda Olsen, a true and correct copy thereof, at the office of the said Steake & Nuzum, at No. 11 Ziegler Block, City of Spokane, State of Washington; that at the time of said service of said answer the said Steake & Nuzum, attorneys, were then and there absent therefrom, and the said Gyda Olsen was then and there a person of suitable age and discretion, in charge of said office.

And this affiant does further certify that the copy of the answer so served was a true and correct copy of the original answer hereto attached.

(Signed) HERBERT H. SIELER.

Subscribed and sworn to before me this 29th day of July, 1916.

[Seal] (Signed) H. V. DAVIS,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

[Endorsements]: Answer to Bill in Equity. Filed in the U. S. District Court for the Eastern District of Washington, July 29, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [24]

[Title of Court and Cause.]

Statement of Evidence and Bill of Exceptions.

BE IT REMEMBERED, that on the 26th day of September, 1916, the above-entitled cause came on for trial before the above-entitled court, and the Court having heard the evidence, and the cause having been submitted to the above-entitled court for

final decision and judgment; Hon. Frank H. Rudkin presided over said court; plaintiff appeared by A. H. Steake and Harold N. Nuzum, his solicitors, and the defendant appeared by Charles S. Albert and Thomas Balmer, its solicitors, and the following proceedings were had and testimony taken:

Testimony of W. J. Reid, for Plaintiff.

W. J. REID, being called as a witness in his own behalf and being first duly sworn, testified as follows:

I am the plaintiff; am married. My family consists of a wife and two children. I have lived in Spokane on and off for the last twelve years, about eight years altogether in Spokane. I was employed by the Great Northern Railway Company as a cook some time the first of April, 1915, by Mr. McElroy, superintendent [25] of boarding cars. I was under his supervision. I was shipped to Great Falls and worked all the way on the Butte Division to Geyser and Basin. On the 10th of May, 1915, I was employed at Geyser as cook on the boarding car of a work train. I was injured on the 10th of May, 1915.

Q. State to the Court your injury and the cause of it.

Mr. ALBERT.—A release of all personal injuries is pleaded and attempt is made to set it aside upon the ground of fraud and misrepresentation; also an attempt to plead a mistake. It is our contention that under the general form of the release covering all personal injuries that the only evidence admissible relating to the fraud is evidence which goes to

(Testimony of W. J. Reid.)

the misrepresentation of fraud in the procurement of the release, and not as to the extent of the injuries, and that there cannot be any showing or claim made that there was not included in the release all of the injuries which this man suffered, either disclosed or undisclosed, and that the statement which this witness is asked to make with reference to any injury which he may have suffered, which are not specifically mentioned in the release, are statements which tend to contradict and vary by parole the terms of a valid written instrument, and are immaterial and not admissible under the pleadings.

Whereupon the objection of the defendant was overruled, to which ruling the defendant duly excepted, which exception is allowed.

A. About nine o'clock that day, half-past nine, along there, I was cooking my dinner for the men and the train crew came along and hitched onto the car and took it out. In putting it back on the switch it came back with an awful speed. It ran off the next three cars before it got stopped. The [26] trucks run off the rails, and practically mashed the biggest part of the dishes. The top of the stove fell across my foot, and it threw me up bodily against the sink, which was near the side of the car, and it hurt me. I got hurt on my foot, and I was shaken up completely, my nerves,—nervous shock, and I have been sick practically ever since. Worked a little off and on.

I have always cooked, ever since I was fourteen years old. I worked all the way from \$125 to \$60

(Testimony of W. J. Reid.)

a month. I was receiving from the Great Northern \$60. I was to work steady. Since I have been injured I have been able to work just by spells. Just when I really had to make a few dollars to make a living. After I was injured at Geyser, I went to Great Falls. I was met at the depot by two men. I don't know who they were. They took me to the doctor's office in an automobile. Examined my foot, bound it up and told me I was badly shaken up and said, "You will be all right to work to-morrow, if necessary." Just examined my foot, that was all.

I met Mr. McElroy, superintendent, at the depot.

Q. State if you remember anything that occurred between the claim agents and Mr. McElroy at that time. State what the conversation was.

Mr. ALBERT.—That is objected to on the same objections which I made as to the character of the evidence seeking to avoid the release, as immaterial and incompetent.

Which objection was overruled, to which ruling defendant duly excepted, which exception is allowed.

A. Mr. McElroy says: "Can I speak to the man"? The claim agent says "Who are you"? something like that.

I don't recall what McElroy said. They took me away. I had some talk with McElroy. I went to the office of the doctor, and after the doctor examined me the claim agent took me right up to his office.

He asked me to sign some papers. I don't know what they was. I was too confused. I can't remember one thing I signed, [27] or anything.

(Testimony of W. J. Reid.)

Q. State what he said to you.

A. Why, he said it was necessary to send these back to St. Paul. That is what he said to me.

Q. Did he offer you any money?

A. No, he said, "You better take ten dollars for to get some liniment," and something like that,—
"ten dollars to get some liniment to rub on my feet."

Q. Did he say anything to you about your working or anything?

A. Yes, he did; said I could just stay around town two days and go back to work whenever I wanted to.

I have stated everything that the doctor told me about my condition then.

Q. In what condition had your health been before you were injured?

A. Well, I would say,—I was in good condition, holding big jobs, weighed all the way from 130 to 135 and once I weighed,—about 134 is what I generally weighed. That was a couple of months before I was injured. When I was injured I suppose I weighed about 130 to 134 pounds. Since my injury I have been sick all the time. I weighed yesterday 113½. I was examined by the Great Northern doctors, and by Dr. Downs. I had been examined by Dr. Downs with Dr. Gallagher. I believed the statements made to me in regard to my condition by the doctor. This was on the same day I was injured.

Q. When did you first know, Mr. Reid, that you had a double hernia?

A. I don't know now. The next day,—I didn't know what it was. I discovered something down

(Testimony of W. J. Reid.)

there where it hurt. I had a very small rupture before on the right side, about the size of a marble. I had worn an elastic truss.

Q. Had you ever been bothered with it?

A. Never, part of the time I would leave it in bed, wouldn't use it. When I went from Geyser to Great Falls my foot was swollen up, so it hurt me, and I cut my shoe right up there. It swelled up a bit, bandaged it up. I went back to work that same day, because the doctor told me there was nothing the matter with me.

Q. Did he say you were injured?

A. Yes, sir. [28] I worked until I couldn't walk, about five weeks; then I went to Great Falls. The paper that I signed in Great Falls, I just looked over it, I can't read very good, and I just signed that and they said it was written; they had to go to St. Paul or some place. They didn't read it to me. When I was in the office of the claim agent at that time, I felt weak, nervous, pained. I felt bad down there when I got hurt. It is 40 miles from Geyser to Great Falls. I was on a train in about an hour after the accident, somewhere about that. I laid down in a seat going down and reached Great Falls two or three hours after the accident. I was back at Geyser about half-past four. I left Geyser, going down in the morning, just before dinner, about ten o'clock. The whole thing transpired in about six hours, from in the morning to four-thirty.

Cross-examination.

Whereupon the witness was cross-examined by

(Testimony of W. J. Reid.)

Mr. Albert and testified as follows:

At the time of the accident I was about 38. Never worked for the Great Northern before. I worked at Geyser before this accident and afterwards. We moved from Geyser the third or second day after the accident to near Judith Gap near Buffalo. I couldn't say how long I worked at Buffalo. I don't remember the stations. We were moved so often. Went to Hobson and Moccasin and worked at Armington one day. I worked on the morning of the day I got hurt up to the time of the accident. I came back in the afternoon and worked that afternoon. I worked continuously from then up to the second of July,—continuously all along. I was the only cook at that point. I not only worked for the Great Northern up to the second of July, but I worked at various places and times since, a week or two whenever my health [29] would permit. I am working now. Have been working a week here at the French Cafe. Previous to that time I worked at Wallace a week. I worked at Union, Idaho, I don't remember,—about two or three weeks. These are all after I was injured. I worked about three weeks at Union, Idaho. I worked in October and November, 1915, some time. I didn't keep track. Part of the time I laid off and went back again. I worked in November two weeks. I don't remember verifying the complaint in the law action stating how long I worked. I remember swearing that I worked along four weeks at Union, Idaho. I think it was three weeks in October and November, 1915,

(Testimony of W. J. Reid.)

was all I worked. I worked again for the Great Northern Railway Company at Wilson Creek eight days. I worked also at the Baltimore Cafe and German Bakery in this city. I worked seven or eight weeks at the Baltimore Cafe. I worked for the German Bakery about three weeks. I don't suppose I worked over three months and a half or four months altogether.

I had had a hernia before this accident for three years. That was the hernia on the right side. That was the worst hernia that I have got. I got it in North Yakima. I had two pieces of ice up in an ice-box; I threw them up in the ice-box and it fell down and I caught it in my hand. That strained me and I had a rupture. I had been wearing a truss about two years before I got hurt. I felt sick to the stomach that day, more sick I guess than I did pain. The pain didn't start until the next day, and I wondered what it was. I didn't have any difficulty with my feet before the time of the accident.

Q. You didn't cut your shoes or do anything of that sort before this accident.

A. No, sir; never had anything only an ingrowing toe-nail, and had that a year ago. I didn't complain before the accident of my feet swelling, and I [30] never cut my shoe.

Q. But you say you had sore feet before that time.

A. Yes, sir; I say I cut it right there. There was an ingrowing toe-nail.

Q. You did cut your shoe then before this accident?
A. No, sir, on the side a little bit.

(Testimony of W. J. Reid.)

Q. And that was done only for the purpose of protecting this ingrowing toe-nail?

A. Yes. I never had rheumatism in my life. At the time the accident happened I was washing dishes. The men had already had their breakfast and gone. I was standing at the sink washing dishes and the car went off the track. It did not turn over—pretty near it. The first two trucks went off the track. The other trucks remained on the tracks. The majority of the dishes were broken. They hit the top of the ceiling. I was standing between the stove and the sink. A big heavy stovelid, weighing about ten pounds, is what hit my foot. The rest of the stove didn't hit my foot. That hit my right foot. My left foot was hit by so many things that fell on me from over the high shelves, I don't know what hit me. The lid bruised my foot. There wasn't anything above heavy enough to do the work. I was hit on the arm and on the foot. I fell against the side of the sink. I was facing it. I was thrown up against the sink with my stomach. I went right forward. As soon as the confusion was over and the car steadied I rushed out. I got out myself. I went to Great Falls about an hour after that. I went to my room to get the things. I went to the station agent first. He came over and looked at the car. I didn't clear up around there myself. I didn't prepare the dinner before I went to Great Falls. They sent two men to prepare the dinner. I never had anything to do with the dinner. Couldn't wash a dish. I went to Great Falls. I

(Testimony of W. J. Reid.)

was met there by some men.

Q. I wish you would look around here and see if you see the men that met you there at the station.

A. Mr. McElroy is the only one I can recollect. [31] I saw a certain man up in the claim department that day. The man sitting back there. I saw him at the claim department. I did not see him at the station. Mr. McElroy is the only one here whom I saw at the station that day. I don't remember what the doctor looked like. I was shook up so bad I don't remember. I remember telling him that if there was anything the matter with me I wanted to go to the hospital or get something done, and he said there was nothing the matter. I remember the conversation Mr. McElroy had, but I don't remember the appearance of anybody that was around there. I am able to read and write very little. I can write my own name. I can write other things as a matter of fact. It is my idea that I suffered injuries that day from this accident, and that I have been suffering ever since, and never felt the same. Have never felt well since is my idea. I wish to swear to that as a fact.

Whereupon the following proceedings were had:

Certain papers were marked Defendant's Exhibits 1, 2 and 3 for identification.

That is my signature on the back of exhibit number 1. I remember getting ten dollars. He told me to buy liniment with. I don't know what I signed. I do know that that is my signature and that I got my money on that. That is my signature on the

(Testimony of W. J. Reid.)

bottom of Defendant's Exhibit Number 3. It is my handwriting. I don't remember signing it. That is my signature on Defendant's Exhibit 2. I never read that paper and I don't know why I signed it. I signed, I guess, pretty near everything that was put in front of me. On the back of Defendant's Exhibit 2 that is in my handwriting. The claim agent dictated that all right enough. He told me the words to write on there. It is my handwriting and I signed it. I know that "I have read the [32] within release before signing and fully understand that the sum of ten dollars is for settlement of all claims of every kind," is in my handwriting. I don't recollect signing it. I don't dispute my own handwriting.

Whereupon the defendant offered exhibits 1, 2 and 3 in evidence, and no objection being made by the plaintiff, the exhibits were admitted.

Whereupon Defendant's Exhibit Four, two pages, one and two, was marked Defendant's Exhibit No. 4 for identification.

That is in my handwriting. I wrote and sent that letter to the claim agent. I remember the letter now. It is in my handwriting.

Q. At that time you knew that you had settled this suit, didn't you?

A. Not until I went back that afternoon. They told me I had settled it. At the time I wrote this letter I knew that I had settled it. John Gray was the man told me I had settled after I went back that night. He was a man that was working in the gang.

(Testimony of W. J. Reid.)

He asked me if I signed a paper and I says, "Yes, I signed everything that was put in front of me."

Q. What did you mean when you stated in this letter: "I am now well and am very badly in need of work."

A. Now, this letter was in—I mind writing the letter all right. It was some time about Christmas. I was out of money and I wanted to get to work and the Great Northern wouldn't give me work.

The COURT.—Is it dated?

Mr. ALBERT.—The date of the receipt at our office is October 23d; evidently written on the 22d.

WITNESS.—It was the day I went to work at the Baltimore. I got the job the same day.

The COURT.—This date is October 22d.

WITNESS.—It was way on later than that. It was in the middle of the winter. [33] I went to work on the same day this letter was written, some place, I don't know where it was.

Before the accident I used to do all the lifting myself. I was doing the cooking alone at that time. I was cooking for ten or twelve men there,—some days fourteen. Probably once fifteen. I had to handle flour and potatoes and sides of beef and all that sort of thing. After the accident I had a man who helped me. His name was Twohy. The fact is I put all the work on the car man I could. He kicked. The hernia didn't bother me before the accident.

Q. At the time that you felt this pain right after you got this hernia before, it didn't bother you?

(Testimony of W. J. Reid.)

A. Not particularly; it was only a small one; it didn't bother me much. Once in a while if I would do any heavy lifting I would put on a truss. I don't remember whether the office of the claim agent was on the ground floor or upstairs. The claim agent was with me all the time; just took me where he wanted to take me. My foot afterwards swelled up, got big. It swells yet. I guess it is swollen now. Whenever I work hard ever since I got hurt it swells. I thought possibly that it was rheumatism at first. I didn't ask the doctor about it. Just went on about the Great Northern work. He told me it was just a sprain; would be all right.

Q. I say, when was it that you first claimed to any officer of the company the fact that you had gotten this rupture?

A. I wrote to Mr. McElroy, superintendent of boarding cars and asked him to relieve me.

Q. Never mind what you wrote. I want to know when you first made the claim.

Mr. NUZUM.—I object to that.

The COURT.—Simply asked him when it was. He didn't ask him what the claim was.

A. Along in June. I was still on the line.

Whereupon defendant offered in evidence exhibit 4, to which offer the plaintiff made no objection, and said Defendant's [34] Exhibit 4 was received in evidence.

Redirect Examination.

Upon redirect examination by Mr. Nuzum, he testified as follows:

(Testimony of W. J. Reid.)

I left off work at the Baltimore Cafe because the boss told me I wasn't able to do the work because I was too stiffened up. I was second cook. I was receiving \$12 a week.

Q. What was your object, Mr. Reid in stating in this letter that you had recovered?

Mr. ALBERT.—That is objected to as incompetent. The witness has stated by the letter that he was well and wanted to go to work.

The COURT.—He can explain his reason for making the statement, if he had any.

Whereupon the Court overruled the objection of the defendant, to which ruling the defendant excepted, which exception is allowed.

A. In the first place I knew I couldn't get a job with the Great Northern unless I was well and another thing I was broke and the children had no money and I had to do something. That is the reason I wrote the letter.

There was no one else in the car with me at the time of the accident.

Recross-examination.

Upon recross-examination by Mr. Albert he testified as follows:

Q. Will you please give me the names of those places where you were earning one hundred or one hundred and twenty-five dollars a month, or whatever they were?

One of them was a mine up in Mace, Idaho. I was getting four dollars a day. I worked a day and a half. I got sick. This was subsequent to the ac-

(Testimony of W. J. Reid.)

eident. It was at the Polson Log Company at Hoquiam I got one hundred dollars a month. At Jackson & McDougall at Buckley I got ninety dollars. I worked [35] for one hundred dollars a month for the Elk River Logging Company at Fernie, B. C. Then for Mr. Thornton, eighty dollars a month at Tyson Creek, Potlatch eighty dollars a month,—the Potlatch Lumber Company.

Testimony of Harry Wells, for Plaintiff.

Thereupon HARRY WELLS was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

I am a restaurant cook now working at Nimm's Lunch. I have known Mr. Reid about four years. I was rooming with him; worked for him up in Glacier Park in the United States Reclamation Service. Worked for Mr. Savidge. That was about three years ago. He was rooming with me in April, 1915 at the time he left for Montana. His family was then out of town. I had been rooming with him for about six weeks.

Q. During that time did you have occasion to notice whether or not he had had a rupture?

A. He had a rupture on his right side; not very big at that time; about the size of your small finger.

He wore a kind of a rubber truss and put it on part of the time; wasn't wearing it very much; was laying around the room. He was getting \$85 a month up there in the Reclamation Service. Mr. Reid's health was good. He didn't have any trouble

(Testimony of Harry Wells.)

at all doing his work. He weighed about 136 to 138 pounds. This was when he was in the Reclamation Service about three years ago. I thought his physical condition was fine then.

I saw Mr. Reid when he got back from Montana. His condition was very poorly. He was just walking along when I saw him. I think he just came in the night before; I happened to see him in the morning going to work.

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert he testified [36] as follows:

At the time I was working at Savidge's was three years ago, and at that time he had a rupture about the size of your little finger. That was when it was protruding.

Upon redirect examination he testified as follows:

At the time I resided with him he didn't complain of any trouble with his feet.

Testimony of George T. McElroy, for Plaintiff.

Thereupon GEORGE T. McELROY was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

On the 10th of May, 1915, I was superintendent of boarding cars for the Great Northern. I had been with them in that capacity for about a year and a half. I am not now employed by them. I saw Mr. Reid along in the spring. I cannot recollect the day. It was in 1915 at the commissary at Hill-yard. He made an application for a position as a

(Testimony of George T. McElroy.)

cook. He was in there a number of times. The first time he came there I had no position for him so I instructed the chief clerk to take his address and call him in case he needed a cook, but he called in there a number of times before we had a place for him. I shipped him to Montana. The next time I saw him was as I got off the train at Great Falls. I saw him on the platform coming up with two gentlemen. That was the day of the injury. I didn't know them. I never had any conversation or connection with them after that.

Q. State what conversation took place between these gentlemen, these claim agents.

Mr. ALBERT.—Objected to as immaterial, not binding upon the defendants, irrelevant, not competent, pure hearsay.

Whereupon the Court overruled the objection of the defendant, to which ruling the defendant duly excepted, which [37] exception is allowed.

A. Why, I started to go up to speak to Mr. Reid and the old gentleman stepped between us. I wanted to ask him what the trouble was because I saw he was hurt, looked bad and his shoe was cut up there and he seemed in pain. I knew he had only been there somewhere about thirty days or a month and I recognized him and I wanted to see what the trouble was and the gentleman objected to my talking to him. He asked me who I was and I told him who I was. "Oh," he says, "That is different," he says, "You can talk with him, but I thought you were a

(Testimony of George T. McElroy.)

lawyer trying to get a case." I says, "No, I am not a lawyer."

The following day or some time during the week I went down there. The car looked all right when I got there, except the dishes were all broken and we had to ship them a whole lot of dishes from Hillyard. The stove was repaired, a heavy plate that was on top. I saw Mr. Reid when he came in from Great Falls. I don't remember when it was,—at Hillyard. He was walking with a cane and limping badly, and looked bad and I advised him to go and take a rest.

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert, he testified as follows:

I am employed no where at the present. I am working at my profession, optician. I haven't been employed for some time,—since the 2d of July this year. I was dismissed from the service of the Great Northern Railway Company on September 15th, 1915. I am now threatening to sue the company or its officers. When I saw him at Great Falls that day he was limping. They were helping him along, one on each side.

Testimony of W. Cotton, for Plaintiff.

Whereupon W. COTTON, was called as a witness in behalf of the plaintiff, and being first duly sworn, testified as follows:

I am running the Red Star Employment Office. Before [38] that I was working with J. H. Travis in the Red Cross Employment office about twelve

(Testimony of W. Cotton.)

years. I first met Mr. Reid about eight or ten years ago as a cook. I had occasion to ship him out on jobs. The last time I shipped him out was about three years ago. Going wages at that time were from seventy-five to one hundred dollars a month. He was in good health at that time. Able to hold down a position. I should judge he weighed around about 135.

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert he testified as follows:

Three years ago we were shipping out carloads of men every day. I shipped Reid out a couple of times a year. This Red Cross Employment Agency has no connection with the Red Cross Association.

Testimony of Dr. George A. Downs, for Plaintiff.

Whereupon Dr. GEORGE A. DOWNS was called as a witness in behalf of the plaintiff, and being first duly sworn, testified as follows:

Mr. ALBERT.—I will admit his qualifications.

The first time I saw Mr. Reid was in my office on February 26th, 1916. Dr. Gallagher and myself were present.

Q. State to Judge Rudkin what you found at that time in your examination.

Mr. ALBERT.—That is objected to as a statement of conditions nearly a year after the accident, not within the issues; any injury which he may have found at that time is not within the issues. The release which has already been admitted in evidence

(Testimony of Dr. George A. Downs.)

is a general release, covering all injuries, whether they were discovered at that time or not; that there is no proper pleading of mistake in the issues; that the testimony [39] of the doctor as applied to the injuries which he discovered afterwards is immaterial and tends to contradict and vary the terms of a valid written instrument; that the injuries are not connected with the accident.

Whereupon the Court overruled the objection of the defendant, to which ruling defendant excepted, which exception is allowed.

A. I found Mr. Reid suffering from a right and left inguinal hernia; found him very poorly nourished, in a very nervous condition and also found him suffering with a slight swelling in the right foot, and also a flat foot on the right foot. The hernia on the right side was the larger one. The one on the left was not so large. The hernia on the right extended down into the scrotum, making a swelling here larger than your fist. The one on the left would be about the size of a walnut. The arch of his foot was flattened out and broken down somewhat. The right foot at that time was swollen and a little bit larger around the ankle than the other foot. Yesterday when he was examined by the Great Northern physicians he weighed 116½ pounds with his clothes on, 113 pounds nude.

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert he testified as follows:

I examined his left foot in February and yester-

(Testimony of Dr. George A. Downs.)

day. I found his left foot flat-footed, but not as flat as the right, perhaps. I found that flat-footed condition which existed with reference to the right foot generally prevailed with reference to the other foot; that is to say, that the arch had become broken on the left foot and it had broken on the right, with this exception I didn't measure the circumference around the instep yesterday. That I did do in February. In [40] February the right foot was smaller; the circumference around the instep was larger than the left, but yesterday I found both of them were broken. In February I found around the ankle and over the instep along the malleolii, the right one was five-eighths of an inch larger than the left.

Whereupon the following proceedings were had:

Mr. ALBERT.—I will admit that Dr. Gallagher will testify the same as Dr. Downs.

Mr. NUZUM.—Very well, that is all.

Whereupon the plaintiff rested.

Whereupon the solicitor for the defendant introduced the following testimony.

DEFENDANT'S TESTIMONY.

Testimony of Dr. A. F. Longeway, for Defendant.

Dr. A. F. LONGEWAY, a witness produced by the defendant, being first duly sworn, testified as follows:

I am a physician and surgeon and am regularly employed in connection with cases of the Great Northern Railway Company arising in the Great

(Testimony of Dr. A. F. Longeway.)

Falls District. I am on a salary. I have been a practicing physician and surgeon for thirty years and am duly licensed to practice in Montana. Have been in active practice since 1886. I remember examining W. J. Reid in May, 1915, the same man who is here in the courtroom.

Mr. Reid was brought to my office one day in May and he said he was suffering from an injury to the foot. In making out a report I found that the cook-car in which he was working had been derailed and he was injured by having a stove lid hit his right foot. He also said he had a bruise about the shoulder and about the arm. I examined his foot and found that it was injured and bruised and the ankle slightly sprained. He was walking on it, walked on it to [41] the office. I asked him about his arm and he said that didn't amount to anything. I asked him to take off his coat and he said that didn't amount to anything, his injuries were not bad and he wouldn't take off his coat and let me examine it. He said that he would be all right; he was just bruised about the right arm and shoulder. Consequently he didn't take off his coat and I didn't examine his arm. He said it didn't amount to anything and would be all right. I bandaged his foot and told him to stay around two or three days and let me watch him. "No," he said, "It is all right," He wanted to get right back to work and he left my office and that was the last I ever saw of him. His right foot then was practically the same as it is now, except it was more swollen around the ankle at that

(Testimony of Dr. A. F. Longeway.)

time than it is now. He had a pretty flat foot. He told me that he was a cook and it wasn't absolutely flat. At that time he was not a well nourished man, probably was a little heavier than he is now. He was an undersized man, and not in robust health by any means at that time. He didn't at that time complain to me about any hernia, or any other injury than these that I have testified to. He only complained of the injury to his foot and shoulder. Mr. Burton and my stenographer were present in the office at the time I made this examination. I should judge he was in not over ten or fifteen minutes. I didn't make any statement to him that he could go right back to work, that his injuries were slight.

I asked the man to stay around two or three days where I could take care or look after him, and he said "no," that his injury didn't amount to anything and he wanted to go right back to work. I told him I thought he would be all right. That was my opinion, that he would be all right very shortly, although I thought he better stay around there perhaps two or [42] three days to see if this ankle swelled up any more. I believed he would be all right in a few days, or I wouldn't have told him that.

Cross-examination.

Whereupon, upon cross-examination by Mr. Nuzum he testified as follows:

When I examined Mr. Reid I examined his ankle and wanted to examine his shoulder, and he said it didn't amount to anything and wouldn't take off his coat. I didn't take off his trousers. He was an

(Testimony of Dr. A. F. Longeway.)

under-weight man. I wouldn't guess at his weight. Possibly he was heavier then than he is now. Mr. Burton is the claim agent of the Great Northern. He is the man who brought him into the office at that time. I advised him to stay around two or three days and let me watch him, and he made the remark about his injury not amounting to anything and he wanted to get back to work. Didn't complain to me about any pains in his abdomen. Didn't tell me that he had had any hernia. Didn't say anything about his abdomen at all.

Redirect Examination.

Whereupon, upon redirect examination by Mr. Albert he testified:

He didn't make any complaint of any injury excepting his ankle and shoulder. I didn't have any talk with him about settlement. Never mentioned settlement to him. When Mr. Reid was in my office he appeared to me to be perfectly rational. He spoke very freely, made out the report and answered all questions. I could see nothing irrational. He seemed to understand the conversation and what he was doing. I didn't notice he stuttered. [43]

Testimony of W. J. Burton, for Defendant.

Whereupon W. J. BURTON was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I live in Great Falls, Montana, and am traveling claim agent for the Great Northern Railway Company, and have been for about four years. Have

(Testimony of W. J. Burton.)

been stationed at Great Falls a little over two years. Generally my duties are to investigate accidents and claims and settle them. I know Mr. Reid since the day he was injured, about the 10th of May, 1915. The first time I saw Mr. Reid that day he came to our office in the Codd Building shortly after noon, about one o'clock. I had never seen him before. I didn't see him at the station or bring him up in an automobile or anything of that kind. He came to our office. The claim agents located at Great Falls are P. B. Foley and myself. We had a stenographer but he wasn't in at that time. He was out on the road some place. There are no other claim agents who were employed at Great Falls or otherwise who were in Great Falls that day.

Shortly before the arrival of train No. 237, which was due at Great Falls at that time about 1:30, the superintendent's office called up and said that one of the cooks in the outfit cars at Glacier had been injured and he said he was coming to Great Falls on 237. Mr. Foley asked me to go to the depot and meet him and when the train was due I went down to the depot and looked around when the passengers got off and was unable to find the man that was supposed to have been injured. I didn't have his name at that time. I looked the passengers over as they got off the train and I didn't see anybody that appeared to be crippled in any way; and after I [44] made sure that all the passengers were off the train and I couldn't find him I returned to the office. I never saw Mr. McElroy in my life until to-day.

(Testimony of W. J. Burton.)

I had no conversation with him at all. Mr. Foley was not at the station at that time. I was there alone. I didn't take Mr. Reid up in a machine from the station. I never saw him until he came to the office himself. He was alone. The office is on the second floor, two blocks from the depot. There is an elevator in the building.

Just after that this man came in and I was in the stenographer's room and he told me who he was and I asked him how badly he was injured and he said he didn't think it amounted to much, although he wanted to see the doctor, so Mr. Foley requested that I take him up to Dr. Longeway's office, which I did. In leaving the office we went down to the elevator and rang for it and he didn't answer, so we walked down the steps and out into the street and then about half a block and then continued up Center Avenue a distance of a block and up to Dr. Longeway's office. We walked up two flights of stairs to Dr. Longeway's office.

We waited a few minutes in the waiting-room and Dr. Longeway came out of his office and I told him that Mr. Reid had been slightly injured and wanted him to look at his foot. He said he thought that his ankle was sprained. Dr. Longeway asked Mr. Reid to take off his shoe. He didn't have any stockings; had a cloth wrapped around it. He had on rather a heavy pair of shoes and they were cut full of slits, both of them—that is the way it was cut, from the top here clean through to the toe, down to the sole, three slits in each shoe and a slit on either side, the

(Testimony of W. J. Burton.)

left one—that was the one that he said was not injured. The left one was slit open [45] as well as the right. He had no socks on but had some white rags or cloths around his feet.

Dr. Longeway says, “Well, what seems to be the trouble?” He says, “Well, my ankle is hurt, I think.” He said, “Well, take off your shoe.” And the doctor looked at his ankle and twisted it around and said, it is slightly swollen and he examined it very carefully and wiggled it all around. I remember that; and he put some strips, some kind of blue strips on it, surgeon’s tape. Went down in under the foot and up both sides and then around. And he asked him if he was injured any place else and he said he had a little bruise on his arm. The doctor says, “Take your coat off and let’s look at it.” “No,” he says, “It isn’t very bad, it don’t amount to anything.” I says to him, “Let me look at it.” He says, “No, no,” and he refused to take his coat off and then I spoke up and said, “have you any other injury?” and he said, “No, just shook up a little,” he says, “I was knocked down in the car.” I says, “Well, you are sure you haven’t any other injuries?” He says, “No, none at all only that ankle and he says, “that pains because my feet has been crippled for a long time,” he says, “and it hurts me.” He wasn’t at that time nauseated, or vomiting or anything of that kind while he was there. He was using tobacco of some kind. Got up to spit.

His general appearance seemed to be all right. He was very sociable, talked very freely, explained

(Testimony of W. J. Burton.)

the accident, gave me the time and just what he was doing and talked a great deal all the way from the office to the doctor's office, and he also talked at the time the doctor was taking care of his foot. The doctor asked him to stay around a day or two until the swelling went down and he said, "No, it [46] isn't necessary; it don't amount to anything," and he wouldn't stay.

After leaving the doctor's office we left the building together and started down the street going from there to Central Avenue and then down Central Avenue; as we were going down he told me that he had been troubled a great deal in the past with rheumatism; that both of his feet and legs would swell at times and he said that was due to working around the water, kitchens all the time and he said he had been reading in the papers about balsam salve of some kind that was highly recommended for rheumatism and he asked me what I thought about it. I told him I didn't know much about it, but it might be good; I didn't know anything about it and he said he wanted to get some and he asked me if I would take him to the place where he could get it. So I took him over to the Great Falls Drug Company and Mr. Watson is one of the owners and I walked up to Mr. Watson and told him what the man wanted. So he bought two tubes of it. It comes in little tubes about that long. He paid twenty-five cents a piece for them and said he was going to take them back with him to rub on his legs; said there was oil in it and it would keep them dry. We walked

(Testimony of W. J. Burton.)

around Central Avenue,—walked down the street and then crossed over and went over to our office. When we got to the corner of Central Avenue and Second Street North—the depot is right off down Central Avenue a block—we turned to the right and he started on down and I says, “You better come up to the office now and see Mr. Foley before you go back.” So he said, “All right,” and he came up to the office and we went into the office and went upstairs into the office and I turned [47] him over to Mr. Foley.

When we entered the office Mr. Foley was talking to somebody and in the matter of a minute or two he came out and asked Mr. Reid about his foot and he says, “It don’t amount to anything; little bruise on it is all,” and he just pulled his trousers up that way and showed where it had been bandaged, and laughed. He said they just got through breakfast and were on a side track at Glacier and a freight engine came in to pick up some cars that were behind the outfit car, and in order to get them they had to pull the outfit car and these other cars out and set the cars out, set them on the main line, and they were setting them back on the side track. He said when they were shoving back in the car was derailed and he said, “I was standing by the table and when it got off the track,” he said, “and derailed” it seemed he went to catch himself and he turned his ankle. That is what he told me and what he told Mr. Foley.

He got a pencil and a piece of paper and described it and Mr. Foley says, “Well, what do you think we

(Testimony of W. J. Burton.)

ought to do for you on it?" "Well," he says, "I don't suppose you have to do much of anything; I am just losing a little time; going right back on this train. You ought to pay me for my time to-day; I have lost a day," and Foley asked him what he was making and he said sixty dollars a month, and Mr. Foley then asked him if he was going to stay in town over night; if he was, he could get him a place at the hotel. He said no, he wanted to get right back. He asked him again what he thought we ought to do for him in the way of a settlement. "Oh," he said, he didn't know; thought he ought to get a couple of days' time out of it, and Mr. Foley asked him if he thought ten dollars would be all right. "Yes, that is fine; [48] that will be all right," he says, "I will go back to-day." After he said that he would accept the ten dollars *as was* sure that his injuries were only very slight, why he then got up and went into Mr. Foley's office and I went into the stenographer's room and he and Mr. Foley were talking in there and I made out a set of release papers on the machine and then I took them in and handed them to Mr. Foley. Defendant's Exhibits 1, 2 and 3 were the papers I made out; at the same time I made some duplicate copies of release and voucher; that is, Defendant's Exhibits 2 and 3. While I was making these out, Mr. Foley was making out the draft. When I took these in and handed them to Mr. Foley, he in turn picked them up and handed this one and the duplicate to Mr. Reid. That is the release, the release of damages and he

(Testimony of W. J. Burton.)

asked him to read that. Mr. Reid read that over, every word of it and when he got down to where it says, "No promise of future employment has been made by the said railroad company as part consideration of this settlement and release or otherwise,"—he read that out loud after he had read it to himself and he wanted Mr. Foley to cut that out; he says that he couldn't go back to work if he signed that and Mr. Foley explained how that had to be in there; that we were not allowed to promise any man future work in case of a settlement. He didn't know about it, but said it didn't look right to him; something like that; and Mr. Foley says, "I will give you a letter to the superintendent so you can go right back to work"; and Mr. Reid read it again and said it was all right and signed it. After he signed this one and the voucher then Mr. Foley asked him to acknowledge receipt of it on the back and dictated this to him and he wrote it and signed it on the original and the duplicate. He said he understood the [49] matter. I paid him the money afterwards.

After the papers were all signed up he was in a hurry to get to the depot to catch that train back, and when they were completed Mr. Foley handed these two papers and the draft attached to me and asked me to go over to the express office for him. So Mr. Reid and I left the office, left our building, crossed the street to the express office and got the money. And he asked me what he should do with that letter he had and I told him turn it in to the

(Testimony of W. J. Burton.)

superintendent's office and he did not know what to do with it and I went down and went and showed him the building the superintendent's office was in and told him to give them the letter there and then he would give him a letter to the foreman certifying that he was ready to resume work.

Cross-examination.

Whereupon, upon cross-examination by Mr. Nuzum he testified as follows:

It is my business to know what happened in my office and the doctor's office. I know in every case. I have been working eleven years for the Great Northern. I know a man has got to read a release before we give him the money. I made notes of everything he did while I read him the release. I do not witness them until I know. I can recall each case which I have investigated and full details, such as I have this one for the last three years. This is the voucher I gave him. I went with him when he cashed the draft at the Great Northern Express Office. There were five cuts in the left shoe and three in the right shoe, and I called the doctor's attention to it when he was in his office and the rags he had on his foot was sticking out the holes. He had oil on the rags; [50] he said to keep his feet dry on account of rheumatism. He talked very freely and sensibly while he was in the office. We asked him about the accident and he explained very fully, very carefully, went over it, went into detail. I don't think he stuttered very much. I don't remember. I don't think he stuttered as much as he

(Testimony of W. J. Burton.)

did here to-day. Mr. Foley gave him the letter to Mr. McCandless, superintendent of the Butte Division. I imagine the superintendent of boarding cars employed the men.

Q. Why should you give a letter to the general superintendent?

A. The Interstate Commerce Commission demanded it.

Mr. ALBERT.—I have a copy of that letter here if you would like.

I asked him to let the doctor see his arm and shoulder, and he refused to do it. He said there wasn't anything the matter, only his ankle and said it was all right. Mr. Foley made the first mention of settlement. Mr. Foley asked him what he thought we ought to do and he said he ought to be paid for the loss of this day. Mr. Reid came up there for the purpose of settlement.

Q. He didn't say anything about it, did he?

A. Yes, he said he thought the company ought to take care of him for that day. I spoke to Mr. Reid about settlement before we got back to the office; after we came from the doctor's office. I asked him to come up and see Mr. Foley before he returned, about a settlement. He was going on down to the train to go home. When we reached the corner I said, "Now, Mr. Reid, you better come up and see Mr. Foley about getting settled up before you go back." And he says, "I will fix that up with the boss and he will take care of me on the pay-roll." I says, "He can't do that. When a man is injured

(Testimony of W. J. Burton.)

he has got to [51] be taken care of by this department, if there is any 'taking care of' to be done." He says, "Well, I didn't know that," he says, "Sure I will go up." And when he left the corner he went up to our office for the express purpose of a settlement and he knew it. As a matter of fact he said he wasn't injured; said it was a slight sprain and would be all right in a few days. That is just the way he put it. I wasn't anxious to get him into my office. My duty is to take care of the men and see that they get the proper treatment. If a man is in town, that is the time to make a settlement. After he gets out into the country we have got to spend money to go after him. I suggested Mr. Reid take his coat off and have his arm examined, which he said was injured, and he refused to do it. There was no statement about this ten dollars being for liniment or anything of that kind.

Testimony of P. B. Foley, for Defendant.

Whereupon defendant called as a witness P. B. FOLEY, who being first duly sworn, testified as follows:

I am assistant claim agent for the Great Northern Railway Company at Great Falls, Montana, and have been there about six years. I recall the matter of the settlement with Mr. Reid. About the first time I saw Mr. Reid was when Mr. Burton advised me that he was in my outer office. I told Mr. Burton to have him come in, which he did, and I went over the case and later got a history of the case from Mr. Reid as to how the accident happened, where,

(Testimony of P. B. Foley.)

and so forth, the nature and extent of his injuries and afterwards advised him—said he better consult the doctor and I called Mr. Burton in my inner office and told him to take Mr. Reid to Dr. Longeway's office. He told me and showed me where—that is, showed me his leg, his right leg; said that he had sustained a sprain [52] to his right ankle, and I questioned him very closely as to how the accident happened, and he said that he was in the car. As I say he showed me his right leg saying that he had sustained a sprain to his right ankle, and I looked at it in a casual way and I said, "What is the matter with the other leg?" I noticed his shoe was cut in several places, cut open, and he told me that he had had previous trouble with his legs on account of them swelling up and I asked him again if he was injured in any other manner or any other place and he said no; said he received a little bump on the arm, and that is about all he told me. He left the office with Mr. Burton and Mr. Burton I understand brought him to the doctor's office. About three-quarters of an hour or possibly an hour afterwards he returned. I asked him, "Did the doctor look you over?" He said, "Yes, sir." I said, "What did he tell you?" "He said my ankle was sprained a little; said he thought it would be all right in a little while and advised me to stay around a few days." "Well," I said, "I think you better do that." I said, "I think you better stay around here a few days and have the doctor attend you." He says, "No, I am anxious to get back to the job. I

(Testimony of P. B. Foley.)

will be all right; it is a little sprain; I will be all right; I want to get back on the job." I says, "All right, suit yourself." Then I said, "Well, what do you want us to do for you?" He hesitated a little while and he says, "I don't know. I will only lose this day." Then I says, "Well, I would like to know what you want us to do for you in settlement, that is in the line of settlement." He says, "Well, how will ten dollars do?" "Well," I says, "If that is what you want," I says, "it is all right." So I proceeded to tell Mr. Burton to make out releases for [53] \$10 for Mr. Reid, which he proceeded to do. After the releases were made out by Mr. Burton he brought them in. I was in the meantime drawing up the draft, writing up the draft, and when Mr. Burton gave me the releases and voucher, why I handed over the releases to Mr. Reid and asked him to read the release, which he proceeded to do. Both of them, the original and duplicate both. And he proceeded to read them to himself. Finally he called my attention to the clause in the release down near the bottom, and I laughed at the time, because invariably nine-tenths of the employees will make the same remark—which says, "No promise of future employment is to be made"—and it is a fact that a great many of employees ask the same question. I told him that clause was put in there because we couldn't promise anybody a permanent position. And he realized it then and understood it so then after he signed the release and the voucher I told him to write his acknowledgment on the back

(Testimony of P. B. Foley.)

and I have a card, a form, that I use with the acknowledgment printed on, that is with a typewriter, and I put it before him and I said, "We have got to have your acknowledgment on the back of this release; here is the form we use." I placed it right in front of him and he wrote from that form his acknowledgment with a pen and ink on the back of the release, and signed it. That is the endorsement on the back of exhibit No. 2, the release. This was written on both the original and duplicate release. There was nothing in Mr. Reid's appearance at the time this transaction was going on to show that he was not understanding or appreciating what was being done. He was absolutely rational; absolutely understood. I made it a point to have him thoroughly read this thing over. After signing the papers I asked Mr. Burton [54] to take him over to the Great Northern Express Office, across the street from my office. He left my office and I never saw him again until to-day.

Cross-examination.

Whereupon, upon cross-examination by Mr. Nuzum, he testified as follows:

I asked Mr. Reid to copy this endorsement from a card. I can't help that he didn't spell it the same way as I spelled it in the form. It is there in substance. I think Mr. Burton is wrong when he said that I asked Mr. Reid, "Now, how will ten dollars suit you," and Mr. Reid said "That was fine." I think I am right, because he is the man that asked me how much. I asked him what he thought we

(Testimony of P. B. Foley.)

should do for him. Mr. Reid suggested I give him ten dollars. At the time Mr. Reid first came in the office, he had a little impediment in his speech, I noticed particularly.

Redirect Examination.

Whereupon, upon redirect examination by Mr. Albert he testified as follows:

No, sir, there was nothing said about this ten dollars being for liniment. No indeed.

Testimony of Dr. H. P. Marshall, for Defendant.

Whereupon Dr. H. P. MARSHALL was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Dr. Marshall's qualifications were admitted by the solicitor for the plaintiff. I made an examination of W. J. Reid in the office of Dr. Ward with Dr. Cunningham. Some X-ray plates were taken to show the extent of his present condition. [55]

Whereupon the following proceedings were had:

Mr. ALBERT.—Before I proceed any further with Dr. Marshall's testimony, I am offering his testimony for the purpose of rebutting the testimony of the plaintiff's doctors with reference to his condition subsequent to the accident, if the Court holds that that testimony is admissible; and it is so understood, Mr. Nuzum.

Mr. NUZUM.—Yes, that is all right.

Mr. ALBERT.—Q. Doctor, I wish you would state what examination you made of Mr. Reid. Give his condition at that time and what you found.

(Testimony of Dr. H. P. Marshall.)

A. We made a complete examination; examined the urine and took X-rays of the foot in two positions entro-posterior and lateral, and as I recall on that examination we found he was suffering from three conditions, in the order of their importance, suffering from arteriosclerosis, double inguinal hernia and third, double flat foot.

Arteriosclerosis is a hardening of the arteries and in this case he has what we call calcification, that is, a deposition of calcium salts in the bladder and organs. The causes of arteriosclerosis may be many. Some people may have what we call poor tubing and prematurely have arteriosclerosis; that is to say, unable to stand the trials and tribulations of life and prematurely their arteries become hard without there being any other cause. However, in most cases they are attributable to infection, syphilis being the most common; typhoid fever being common, alcoholism—in other words, various causes. I should say, a man thirty-nine years of age had one of two conditions, either that he started out in life with very poor tubing or that he had had syphilis some time; but [56] either one of those alternatives. Arteriosclerosis is not produced by trauma. Now, it could be a contributing factor in the production of flat foot inasmuch as with arteriosclerosis there is an under nourishment of the parts supplied by the artery, and, being under nourished, naturally they are weak and produce a flat foot, and that indirectly producing the swelling which we usually have with the marked flat foot. I do not think the arteriosclerosis produces

(Testimony of Dr. H. P. Marshall.)

swelling directly in his feet. I should not call his foot marked flat foot. I should call it a flat foot of the second degree. I couldn't see any particular difference between the two feet. The right foot he said was more painful than the left. The right was slightly more flat than the left. He has a scar on both plantar surfaces, a little bony bunch. This is not the usual growth upon the foot of a normal person. It is diametrically prominent on the other side. There is this same bony growth on both feet, and practically to the same extent. This may or may not be accompanied with pain. If it has no pain, then it does not interfere with locomotion. I didn't see any evidences of any nervousness or neurasthenic trouble. There was not any evidence of neurasthenia or other nervous diseases or effect. No evidence of any organic diseases.

Cross-examination.

Whereupon, upon cross-examination by Mr. Nuzum, he testified as follows:

I don't think you could tell by an objective examination whether a person has neurasthenia. I don't know whether he ever had syphilis. There is no sign of syphilis, except blood; that is there may be no sign.

Redirect Examination.

Assuming that the plaintiff was standing in the cook-car, and the car was derailed and that he was suffering from a right [57] inguinal hernia previous to the accident; that by reason of the derailment he was thrown against the sink, with the forepart of his body, and suffered pain from that

(Testimony of Dr. H. P. Marshall.)

time until the next day, and it was subsequently discovered that this man had a left inguinal hernia as well as the right inguinal hernia, the left hernia or any increase of the right hernia would depend upon how forcibly he was thrown. I cannot answer that absolutely yes or no. A rupture never appears without a failure in development. That is necessary. Unusual, sudden and marked increase in the intra-abdominal pressure can be the predisposing cause, but I do not believe the ordinary throwing of one across something is a cause of it. The usual cause is that lifting which sets the diaphragm and increases markedly the intra-abdominal pressure. The predisposing cause is generally some strain from the inside, rather than a blow from the outside. Assuming a man of his height, weighing about 134 pounds, whose business required him to lift quarters of beef and sacks of flour, potatoes and things of that sort, I should say that the lifting would be more liable to cause the hernia which developed upon this man than any trauma or blow which he received in the car. That hernia is not something that takes place just like that. It is a piece of intra-abdominal content getting into the wrong place and closing up the inguinal canal, or the structures that close up that canal; but for the development of this hernia there must be a failure of development. In other words, that canal must be partially open in the beginning. Assuming that he had a right inguinal hernia before the accident, the fact that he had one prior to the development would show that he had a tendency to it; and some author-

(Testimony of Dr. H. P. Marshall.)

ities believe that every time you operate for hernia on one side you [58] must operate on the other side; that there is a tendency for hernia to be bilateral. In other words, hernias are usually bilateral. Occasionally you will see one on only one side. As to the condition of arteriosclerosis having any effect upon his nervous or neurasthenic condition, I should say that a person who has as marked a degree of thickening of the arteries as this man has would be nervous as a result of it and would have an under function of those parts of the body that are supplied by the arteries that are sclerotic. Assuming the accident to be as has been described, and the fact that he was struck upon the foot with some heavy weight, either a stove lid or something of similar nature; that he also previous to the accident had swelling of the feet, and further assuming that the arteriosclerotic condition as I found it yesterday, I would state in my opinion the nervous or neurasthenic condition would be more probably due to the arteriosclerosis. In other words, the arteriosclerosis I feel confident would cause a nervousness. Trauma alone I do not think would cause a nervous injury. In some it might cause some nervousness. So the more probable one would be the arteriosclerosis.

Cross-examination.

Whereupon, upon cross-examination by Mr. Nuzum, he testified as follows:

There are two kinds of hernia, direct and indirect. A direct hernia is one that goes through what is called Hessel Box's right angle; whereas an indirect hernia

(Testimony of Dr. H. P. Marshall.)

is one that follows from the internal to the external inguinal canal. The indirect hernia runs down the canal. I am not quite positive what I found in this plaintiff. I thought there was an indirect and direct hernia on one side. The left side I think is regular indirect hernia, but I am not sure about [59] that because he could have the same appearance as we have got on the right side. I wouldn't be sure without operating; that is very difficult to tell.

Q. And you cannot tell what the cause is of the hernia?

A. I know what the predisposing cause is.

Q. But you cannot tell whether or not it is caused by a severe strain or by lifting or pushing, can you?

A. No, in an individual case I cannot tell what the precipitating cause was.

Q. And isn't it possible, say a man was thrown violently across a car so he could bruise and strain himself, wouldn't that cause this hernia to happen?

A. If thrown violently?

Q. If thrown violently. A. If thrown violently.

Testimony of Ole Rosholt, for Defendant.

Whereupon OLE ROSHOLT was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I live at Dutton, Montana, and have lived there for about six years. My business is at present farming. Prior to this summer I worked as bridge man for the Great Northern. I was foreman of a bridge gang working at Geyser at the time of the accident. I know Mr. Reid. We had been working there about

(Testimony of Ole Rosholt.)

four days. Worked with him from the first of April until the first of July. We averaged about thirteen men in the gang. Reid was doing all the cooking. I had seen him handling different stuff around in the car. Before the accident I saw him handle beef and flour, sugar, potatoes and beets. The potatoes and flour came in sacks and the beef generally in quarters. He was moving this around in the car before the accident. I saw him walking around. He then had his shoes cut over here, slashed in two or three places. I don't know how many slashes it was, but both shoes were slashed. Before the accident he was complaining about rheumatism, his feet swelling up, and then he always was limping. I saw him on [60] the day of the accident. He got breakfast that day and then we got ready to go out, just before seven o'clock and he had made breakfast and we had our breakfast and then this accident happened. As soon as the car stopped I went into the car and I found Mr. Reid standing at the table, and I asked him if he was hurt and he says no. He says he fell when the car was running on the ties, he fell on the floor. It was between ten and eleven I came back from the bridge after some spikes and then I saw him dressed up and I asked him where he was going and he says he was going to Great Falls to see a doctor. He says he thought he had a sprained ankle. He did not appear at either of these times that I saw him that day immediately after the accident, or at ten o'clock, to be nauseated or sick. After the accident and before he left for Great Falls he put kettles on the stove and

(Testimony of Ole Rosholt.)

put in those kettles what was supposed to be for dinner. I saw him at supper time about six o'clock. He said he was up to Great Falls and settled with the Great Northern. I saw him every day around there from that time on until he quit. There was no difference so far as I could see between the way he worked before the accident and after the accident. I would see him at frequent times around there. I saw him the day he quit. He said he was going to Spokane to his family. He didn't say anything to me about quitting, because he was unable to work.

Cross-examination.

Whereupon upon cross-examination by Mr. Nuzum he testified:

I was foreman of the repair gang. My time required me to be on the work to see that everything was done properly. Most of my time, if they were repairing a bridge, was spent watching them. I didn't spend much of my time looking in [61] the cook-car.

Redirect Examination.

Whereupon upon redirect examination by Mr. Albert, he testified as follows:

At the time the accident happened my gang had not gone down to the bridge yet to work. We were right there.

Testimony of Jonas Rosok, for Defendant.

Whereupon JONAS ROSOK was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I know Mr. Reid, the plaintiff. He worked there

(Testimony of Jonas Rosok.)

about three months. I knew him the first time at Great Falls when he got on the job. He joined the bridge and building gang that we men were on there. Was cook on the crew. I saw him and observed him there before the accident; saw him on the morning of the accident and subsequent to it. I couldn't see any difference between the way he handled his feet and the condition of his feet after the accident as I did before. Before the accident he had his shoes cut up, slashed up from the toe on up. I couldn't say if it was both shoes, but I am sure it was one of them. There were several slits. I saw him on the day of the accident. After the accident I saw him in the car, the first time in the cook-car. I went in to see how it looked. He was kind of cleaning up there. I didn't have any talk with him then. He came out of the car afterwards and was talking. He said he got a lid of the stove on his foot. He said he thought he had a bruise on his foot. He was walking around there looking for his hat. After that he was around the car, I guess. The foreman sent me down there to his car to fix a pipe,—a stovepipe. He was around the cook-car yet. I found three or four bottles lying on the floor there. [62] Couldn't say for sure what these bottles were, but I supposed some kind of liniment had been in them. They were empty then. This was before he left to go to Great Falls on account of the accident. I saw him when he came back. He said he had settled with the company. I saw him working around there afterwards from that time on until he quit, the same as he did before. He

(Testimony of Jonas Rosok.)

was still acting as cook there. When he left for Spokane he said he was going to his family.

Cross-examination.

Whereupon upon cross-examination by Mr. Nuzum, he testified as follows:

I went in to cut out the roof, because the roof was too close to the pipe, and fix it so it wouldn't catch fire.

Testimony of David Davidson, for Defendant.

Whereupon DAVID DAVIDSON was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I was in this bridge gang that was around there on the day Reid got hurt. Before the accident Reid complained about his foot. He said he had rheumatism, bothered with rheumatism and hurt awful. That was from the time he started to work there. He had his shoes slashed up. It was on both feet. Before the accident he said that he was ruptured once. I saw him on the morning of the accident. He came out of the car, and didn't have a cap on his head, and the boys went over to ask him if he was hurt, and he said no. I was out at work when he left for Great Falls. I saw him that night when he came back. He said he had been down to Great Falls and settled with the company for thirty dollars. Between that time and the time he went away, I saw him around there. He acted [63] just the same after the accident as he did before. Didn't seem to have any more trouble or any less trouble with his feet than he had before. Seemed to be exactly the same. Did his

(Testimony of David Davidson.)

work in the same way. Didn't have anybody doing his work for him afterwards. He did all the work excepting help to carry in the water and coal, same as before the accident. He had help before the accident the same as afterwards. He was no sicker when he went away than he was when he came there.

Cross-examination.

Whereupon upon cross-examination by Mr. Nuzum he testified:

He told us all at the supper table about settling with the company.

Testimony of Elef Stensland, for Defendant.

Whereupon ELEF STENSLAND was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I was a member of this bridge and building gang that was at work there at this place, Geyser, and I have known this man Reid since the first of April, since he started to work. I was a carpenter. I had the same job as the others. At the time the accident happened we was not working. That happened at half-past six in the morning, between half-past six and seven. We had not gone up to the bridge at that time. I had observed him on the days before the accident, noticed him going around, walking around. He couldn't walk very good and he said several times before that he had rheumatism before the accident. He had his shoes cut up, both shoes. I didn't notice any difference after the accident in the way [64] he handled himself at that time than it was before.

(Testimony of Elef Stensland.)

I was around that night when he came in to the supper table. He said he was in Great Falls and settled; settled for thirty dollars. He told us all the same thing there; we were right there at the supper table when he said that. When he went away finally he talked to the crowd about going away, said he was going to Spokane to see his family.

Cross-examination.

Whereupon upon cross-examination by Mr. Nuzum he testified as follows:

I know a man by the name of Barry, who worked in that gang. He is not here. I don't know anything about him.

Testimony of Chris Jacobsen, for Defendant.

Whereupon CHRIS JACOBSEN was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I was in this bridge and building gang that worked at Geyser at the time this accident happened. I know the plaintiff. I had seen him around there before that. He was limping around from the time he started to work. He told me he had rheumatism before the accident. He had his shoes cut up before the accident. I didn't see much difference about him after the accident. He worked all the time from that time on until the time he left in July. He didn't have any more assistance after the accident about his work than he did before. He had the same.

Cross-examination.

Whereupon upon cross-examination by Mr. Nuzum he testified as follows:

(Testimony of Chris Jacobsen.)

I am working for the Great Northern now. The other boys were working still in the same gang, carpenters. [65]

Testimony of Ole Tweedt, for Defendant.

Whereupon OLE TWEEDT was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I am working for the Great Northern. Davidson and Rosholt are not working for the Great Northern. At the time of the accident I was. I know Reid. I remember seeing him around the boarding-car and camp before the accident. Before the accident I noticed he had his shoes cut. He said he had rheumatism. He quite often made complaint about his feet bothering him or troubling him. He said his feet were hurting him. After the accident I saw him around. I was there until he left. I noticed him on the day of the accident. I had a talk with him on that day. I asked him if he got hurt and he said no. I didn't see him when he went away that day. We was out on the bridge working then. I saw him when he came back. He said he had settled the case and got thirty dollars. It was the same day.

Testimony of John W. Cox, for Defendant.

Whereupon JOHN W. COX was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I am connected with the Great Northern and was at the time of the accident. I was there with this train on which that car was derailed. We had a car to set out there and we had it in behind the outfit.

(Testimony of John W. Cox.)

The car was totally derailed and down a slight embankment. It was not rolled over or anything of that sort. I should judge it was at a thirty-degree angle on the bank. It was sitting up. I went into the car after the accident and looked around. I asked Reid how badly he was hurt, so I could make out my reports. He said his left [66] forearm was bruised and his left ankle was bruised and sprained. He didn't claim he was hurt any other place. Didn't say anything whatever about back or stomach. He didn't make any claim his other foot was hurt. I made out my report; it was just as he told me. This was right after the accident, before we even started to re-rail the car. I did not see him again that day, not after I got my information from him that I wanted, then re-railed the car and we left as soon as we could get the car on the track. I filed this information with the agent, so he could wire in to the superintendent and made my report when I got this made out. I sent a telegram advising him of the accident and what this man claimed.

Cross-examination.

Whereupon upon cross-examination by Mr. Nuzum he testified as follows:

I was conductor on the train.

Testimony of F. H. Nolan, for Defendant.

Whereupon F. H. NOLAN was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I was head brakeman on this train that was being

(Testimony of F. H. Nolan.)

switched there at Geyser upon the day of this accident. I recall the accident to the cook car. I saw Reid around that day. I went in the car as soon as we got the car stopped after the derailment and he told me that he had his left forearm bruised and ankle bruised and that he thought he would not lose any time over the accident. He didn't mention anything about laying off or anything of that kind. I saw him on one occasion before at Rainsford, I should judge four or five days before. He then said he was affected very badly with rheumatism and he would have to lay off and go to the springs he [67] thought. He said his feet were swollen up and showed them to me. That is, he had his shoes on, you know. There was a pair of old shoes he was wearing around the car and they were badly cut up. I should judge there must have been a dozen holes in them.

Cross-examination.

Whereupon upon cross-examination by Mr. Nuzum he testified as follows:

I was one of the train crew that moved the work train. We moved the train from place to place when they transferred. Had instructions to move them at different times. I didn't stay with the train all the time.

Testimony of George L. Robinson, for Defendant.

Whereupon GEORGE L. ROBINSON was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I was rear brakeman of that train crew. I am

(Testimony of George L. Robinson.)

now conductor. I was on the train at the time of the accident. All the witnesses live in Montana. We have come over here to the trial. I assisted in re-railing the car. After it had been re-railed I went in to ascertain what damage had been done, so that I could intelligently make out the necessary reports. In connection with any of these accidents, whenever there is any damage to either equipment or injuries to persons, either one, we are required to make out a report if we care to remain in the service, and tell what the facts are with reference to it. I asked Reid in regard to the damage or personal injury. He told me there was no harm done.

Cross-examination.

Whereupon upon cross-examination by Mr. Nuzum he testified as follows: [68]

Each man is required to sign a report at least.

Testimony of H. J. Putnam, for Defendant.

Whereupon H. J. PUTNAM was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I was swing brakeman on this train at the time of the accident; that is the brakeman in the middle. This was a through freight and local combined,—a mixed train. This outfit train was already at the station when we got there. We were making a spot there, putting some cars in. I remember the fact of the car being derailed. I saw Mr. Reid about the premises that day. The first conversation I had with him before I moved him I went in and told him,

(Testimony of H. J. Putnam.)

I said, "We are going to have to do a little switching and we will have to move you so watch out for your pots and stock." He says, "all right." The next time I saw him was after the derailment. He was standing in the door when I came up alongside of the car and I asked him if he was hurt and he said, "nothing serious." That is about all I had to do with it. He said something hit him on the ankle; said it was pretty sore; that is all. I had seen him before this time. I always noticed he limped a little bit; shoes were all cut up like he might have rheumatism. I saw him about a week after the accident at Buffalo. I had a conversation with him with reference to the injury and the accident. I asked him how he felt, and he said he felt all right. He was still cooking for the outfit at Buffalo.

Cross-examination.

Whereupon upon cross-examination by Mr. Nuzum he testified as follows:

I am still in the employ of the Great Northern.
[69]

Whereupon the defendant rested.

Whereupon the following testimony was offered in behalf of the plaintiff upon rebuttal:

Testimony of W. J. Reid, for Plaintiff (Recalled in Rebuttal).

W. J. REID was recalled as a witness and testified as follows:

I heard the statements of some of these gentlemen who said I had rheumatism. I never have had

(Testimony of *W. J. Reid.*)

rheumatism. I never told them that I had rheumatism. I testified I had an ingrowing toe-nail. That was on the left foot. I never told anybody I got thirty dollars from the company. I never told anybody that I had settled with the company. I never knowed until Mr. Barry told me. He was the man that I saw when I came back, first man I spoke to. He is not here. The doctor examined me in his office. I didn't refuse to let them,—I did not refuse nothing.

Q. You heard the testimony I believe of Mr. Foley who said that you asked for ten dollars and said you would settle for ten dollars.

A. I didn't ask for ten dollars.

Q. Who suggested the ten dollars?

A. He suggested it himself.

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert, he testified as follows:

Q. You recollect now that he suggested the ten dollars, do you? A. Well, I never asked for it.

Q. Do you recollect whether he suggested the ten dollars or not?

A. Well, he gave it to me anyway. I didn't ask for it. I know I didn't.

Whereupon the following proceedings were had:

Defendant moves the Court to strike all of the testimony in the record, received subject to defendant's objection, and all testimony relating to conditions or injuries developing subsequent to the time of the settlement, and all testimony [70] relat-

(Testimony of W. J. Reid.)

ing to the injuries, if any, which were not known to either or both parties at the time of settlement, upon the ground that such testimony and all of the same is immaterial, and is incompetent to contradict or vary the terms of the contract admitted by the plaintiff to have been executed by him; that it is a valid written instrument; that the words contained in the release are general and released all injuries arising out of the accident in question, and are not limited by the specification of any specific injuries, and that the release and the endorsements upon the back thereof show that the plaintiff had fully released the defendant from all claims, on account of the injuries in question, and further upon the ground that such testimony is not within the issues in the case; that the pleadings do not allege sufficient allegations to base an order setting aside the release upon the ground of mutual mistake.

Defendant further moves the Court to dismiss the bill to set aside the release, upon the ground that the evidence is not clear and convincing; that the release was procured by fraud and misrepresentation, or that there was a mutual mistake of fact, and upon the ground that the plaintiff has not sustained the allegations of the bill, which might entitle him to judgment setting aside the release.

Whereupon the Court denies the motions, and each of the same, to which ruling of the Court the defendant excepted, which exception is allowed by the Court.

Whereupon said case was submitted to the Court for its decision. [71]

Defendant's Exhibit No. 1—Draft.

GREAT NORTHERN RAILWAY COMPANY.
No. 18845. \$10.00.

Great Falls, May 10th, 1915.

Pay to the Order of W. J. Reid, Ten & no/100 Dollars, for Personal Injury Rec'd near Geyser, Montana, May 10th, 1915, as per release and receipted voucher for like amount attached hereto.

P. B. FOLEY,

Asst. Claim Agent.

To Assistant Treasurer Great Northern Railway Company, St. Paul, Minnesota.

Note.—This Draft will be honored only when accompanied by receipted voucher for like amount.

Endorsement on back: W. J. Reid. [72]

Defendant's Exhibit No. 2—Release of Damages.

GREAT NORTHERN RAILWAY COMPANY.
RELEASE OF DAMAGES.

KNOW ALL MEN BY THESE PRESENTS, that in consideration of the sum of Ten and no/100 Dollars, to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, have released, acquitted and discharged, and do, by these presents, release, acquit and discharge said Railway Company, its successors and assigns of and from any and all liability, causes of action, costs, charges, claims or demands of every name and nature, in any manner arising or growing

out of, or to arise or grow out of personal injuries received by me (W. J. Reid) at or near Geyser, in the State of Montana, on or about the 10th day of May, 1915, while acting as a Cook, I met with an accident whereby I sustained personal injuries; or arising, or to arise, out of any and all personal injuries sustained by me at any time or place while in the employ of said Railway Company prior to the date of these presents.

No promise of future employment has been made to me by said Railway Company as part consideration of this settlement and release, or otherwise.

In witness whereof, I have hereunto set my hand and seal this 10th day of May, A. D. 1915.

W. J. REID. (Seal)

In Presence of

P. B. FOLEY.

W. J. BURTON.

[Endorsed on the back is the following:]

I have Read within Release before signing and fully understand that the sum of ten dollars is in full settlement of all claim of every kind.

W. J. REID.

Witness:

P. B. FOLEY.

W. J. BURTON. [73]

Defendant's Exhibit No. 3—Voucher.

GREAT NORTHERN RAILWAY COMPANY.

To W. J. Reid, Cook,

Address Geyser, Montana.

Please date and sign receipt and return to Assistant Treasurer, St. Paul, Minn.

For and in consideration of any and all claims
past, present and prospective against the
Great Northern Railway Company arising
or to grow out of personal injuries received
by me at or near Geyser, Montana,
on or about May 10th, 1915.....\$10.00

I certify, that the above is a true copy of an original account approved by the proper officer, that the same has been examined, found correct, registered and filed in the Accounting Department of the Company.

J. H. BOYD,

Auditor Disbursements.

Treasurer's Voucher Made ————. 191—, by

Received May 10th, 1915, of the GREAT NORTHERN RAILWAY CO., Ten and no/100 Dollars, in full for the above account.

\$10.00. (Sign here) W. J. REID.

Endorsed on the back is the following:

Great Northern Railway Co. Voucher No. J289.
Comptroller's No. 24278. Month of May, 1915. In favor of W. J. Reid, Cook, Geyser, Montana.

\$10.00.

Approved for payment.

G. R. MARTIN,

Comptroller.

Paid by draft No. 18845. Drawn by P. B. Foley.
A. C. A., Great Falls, Mont.

Treasurer's Office. Paid May 18, 1915. G. N. Ry.
Co. [74]

**Defendant's Exhibit No. 4—Letter, Dated 10/22/15,
from W. J. Reid to Claim Agent.**

Spokane, 10/22/15.

Clame Agent,

Dear Sir: I beg to call your atention to the fact I was hurt at Geyser, Mont., Butt Devison, whil cooking in a Bording Car for Ole Rosenholt 11 day May 1915, and I settled with you \$10 dollars. I was to have stiddy Job as I supposed I understud so from you. I was sick for 3 months after I was hurt it efected my spine my feet sweld up so I could not walk and I hed to send all my mone getting well all though I went to work the same day I was hurt in the same car. My helth failed stedly tile on July the secont I was forsed to give up my work with the G. N. Ry. I am now well again and am very badly in nead of work as I have a big famly. The letter you gave me to Giles the sup. I gave it to Mr. Burdic the inspector of Bording cars could not of been delivered as I have reported at Hillyard for 4 times and the was no aten, and I no they have hired lot of cook since I would deam it a great faver if you interseat in my Be have take it up with the company and praps I can get cooking in one of the cars or a Lunch Room. I thank you in advance for enything you can do for me the last time I stad 3 month with the car I was on.

Your Resp.

W. J. REID,
Yale Hotell,
Riverside,
Spokane. [75]

Opinion and Findings.

Thereafter and upon the 12th day of October, 1916, the court by Hon. FRANK H. RUDKIN, judge thereof, made and filed in said action his opinion, order and finding in the following language:

On and for some time prior to the 10th day of May, 1915, the plaintiff was in the employ of the defendant as a cook on a work train at different points in the State of Montana, and on the above date while so employed near the town of Geyser, the car in which he was at work became derailed, inflicting upon him certain personal injuries which form the basis of the present controversy. The accident happened at about nine o'clock in the morning, and soon thereafter the plaintiff went, or was taken, to Great Falls, Montana, and called upon the claim agent and surgeon of the defendant company. As a result of the derailment a stove cover or lid fell on the plaintiff's foot, and for this injury the surgeon treated him by bandaging the injured member. After leaving the surgeon the plaintiff was taken to the claim department and there, in consideration of the sum of ten dollars to him paid, executed the following release:

"KNOW ALL MEN BY THESE PRESENTS, That in consideration of the sum of Ten and No/100 Dollars, to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, have released, acquitted and discharged, and do, by these presents, release, acquit and discharge said railway company, its successors

and assigns of and from any and all liability, causes of action, costs, charges, claims or demands of every name or nature, in any manner arising or growing out of or to arise or grow out of personal injuries received by me (W. J. Reid) at or near Geyser, in the State of Montana, on or about the 10th day of May, 1915, while acting as a cook, I met with an accident whereby I sustained personal injury; or arising, or to arise, out of any and all personal injuries sustained by me at any time or place while in the employ of said railway company prior to the date of these presents.

“No promise of future employment has been made to me by said railway company as part consideration of this settlement and release, or otherwise.”

[76]

The back of the release contained the following endorsement in the handwriting of the plaintiff and signed by him:

“I have read with in Release Before signing and fully understand that the sum of ten dollars is in full settlement of all claim of every kind.”

The voucher signed by the plaintiff contained substantially the same recital, viz.:

“For and in consideration of any and all claims past, present and prospective against the Great Northern Railway Company arising or to grow out of personal injuries received by me at or near Geyser, Montana, on or about May 10th, 1915.”

Soon after the execution of this release and the receipt of the money, and on the same day, the plain-

tiff returned to Geyser and resumed his former employment that evening with the defendant and continued in that employment until the second day of July following. Thereafter an action was commenced on the law side of this court to recover damages for personal injuries growing out of the accident in question, and the foregoing release was pleaded in bar. Thereafter the present suit was commenced on the equity side of the court to cancel and set aside the release on the ground of fraud and mistake.

The injuries sustained by the plaintiff as set forth in his complaint are the following:

A broken arch of the right foot; a double inguinal hernia; a severe wrench of the back; and a severe shock to the nervous system. The grounds upon which the release are assailable are the following: First. That the surgeon of the defendant company, after a cursory examination, informed the plaintiff that his injuries were slight and amounted to nothing beyond a mere nervous shock, and a slightly sprained ankle and instep, and that he would entirely recover in the course of a day or two; and that the claim agent of the defendant company informed the plaintiff that he would give him ten dollars, representing [77] two or three days' pay; that the plaintiff might remain in Great Falls during that period, and that his position would be held open for him. Second. That the plaintiff's physical and mental condition was such that he was unable to read or comprehend the contents of the receipt; that he did not have time to read the same; that he signed

it relying upon the representations of the claim agent and surgeon that it was a receipt for ten dollars and nothing more; and that he would not have signed it but for these representations. And lastly, that the injuries above set forth were not taken into consideration by or known to the plaintiff or the representatives of the defendant at the time the release was executed.

One who seeks to set aside a release or other solemn contract on the ground of fraud or mistake must make out his case by clear and convincing proof. A mere preponderance of the testimony will not suffice. Guided by this wholesome and salutary rule proof in this case utterly fails as to the first and second grounds above set forth. Manifestly no misrepresentations of any kind were made to the plaintiff by the surgeon or the claim agent either as to the nature or extent of his injuries. As a matter of fact it clearly appears, not only from the testimony but from the allegations of the complaint as well, that none of the parties concerned knew or even suspected that the injuries sustained by the plaintiff were more than superficial. The injury to the right foot was the only injury complained of, aside from a slight bruise on the arm or shoulder which the plaintiff himself deemed so trifling and inconsequential that he refused to remove his coat so that the surgeon might examine it. And a word here as to the extent of the injuries to the foot may not be out of place. No doubt the arch of the right foot is now broken down; but for that matter [78]

so is the arch of the left foot. The testimony shows clearly that the plaintiff complained continuously of his feet prior to the accident, and that his shoes were all slit up to relieve them. This goes far to show, if it does not demonstrate, that the present condition of his right foot is the result of disease or other infirmity rather than of the accident complained of.

The claim that the plaintiff was unable to read or comprehend the contents of the release by reason of his physical and mental condition is likewise unfounded. The testimony shows that he fully comprehended all that transpired about him, and he was able to contradict the testimony of other witnesses whenever it appeared to his interest to do so. He told the entire work crew at supper that night that he had settled with the railroad company for thirty dollars, and in a letter written a few months later he again refers to the settlement. He took up his usual avocation as soon as he could return to Geyser after the execution of the release, and as already stated, it is all but certain that no person connected with the affair, including the plaintiff himself, had the slightest suspicion that his injuries were at all serious. Written contracts and the statute of frauds will be of little avail if contracts are to be ruthlessly set aside upon such a showing. The only question in the case that gives rise to any doubt in my mind is the question of mistake. If the plaintiff received injuries other than the superficial injury to his foot it is shown beyond question that such injuries were unknown to the contracting parties, and were not taken into consideration in the settlement made. Is

this a sufficient ground in equity for setting aside the release? All the authorities agree that a release of this kind can not be avoided for mere [79] mistakes of opinion or prophecy; in other words, merely because the injuries prove more serious and lasting than the parties thought them to be. Some of the authorities go so far as to hold that a general release of this kind cannot be avoided for mutual mistake at all. Thus in *Houston & T. C. R. Co. v. McCarty*, 60 S. W. 429, the only injury known to or within the contemplation of the contracting parties was an injury to the ankle; but it later developed that there were injuries to the spine and bowels, which were of much graver and more permanent character than the injuries settled for, yet the Supreme Court of Texas held that the release was an absolute bar to the action, stating its conclusion in these words:

“Our conclusion is that the release embraces all damages resulting from the injuries to the plaintiff, and that it cannot be varied by parole evidence tending to show that other injuries than that to the ankle were not in the contemplation of the parties.”

This is the extreme view, however, and is not supported by the weight of authority.

Lumley v. Wabash R. Co., 76 Fed. 66.

Great Northern Ry. Co. v. Fowler, 136 Fed. 118.

In the cases last cited the releases were avoided for mutual mistake of the parties, and while the form of the releases may have differed to some extent from the release now under consideration, no importance seems to have been attributed to that

difference. If, therefore, the plaintiff in this action sustained injuries other than the slight injury to his foot, such injuries were not within the contemplation of the contracting parties and the release should not be permitted to stand in the way of a recovery therefor.

Now as to the nature and extent of the injuries suffered by the plaintiff as a result of the accident complained of. It will readily be conceded that at the present time his [80] body is poorly nourished and that his general health and physical condition are far from good. It cannot be said, however, that these conditions are attributable wholly, or even in a considerable part, to the accident. According to the testimony of one of the physicians his present ailments are, in the order of importance, first, arteriosclerosis; second, double inguinal hernia; and third, double flat foot. It does not appear from the testimony that the first of these was produced in any wise by the accident, and while the condition of the right foot may have been aggravated by the accident it was not caused thereby. The plaintiff had one hernia on the right side for a period of some two years prior to the accident, caused by lifting ice into an ice-box, and the second developed soon after the accident. The course of its development, however, is left in doubt and uncertainty. The plaintiff simply states that he felt a pain in that region the day after the accident, and that he complained of such an injury to the railroad company in June following the accident; but the first definite information we have on the subject is found in the testimony

of the physicians who examined him some eight or nine months later when his condition was found substantially the same as it is to-day. Beyond this the testimony throws no light upon his condition or the cause thereof. Good faith, common honesty, and the peace of society demand that compromises and settlements of this kind should be upheld unless impeached for fraud or mistake by clear and convincing proof. As well said by Judge Sanborn in *Chicago & Northwestern Ry. Co. v. Wilcox*, 116 Fed. 913:

“The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims. It loves peace, hates broils and dissensions, and discourages the [81] prolongation of litigation and the revival of controversies which have once been closed. The judgment of a court settles the claims submitted to it, and estops the parties from again litigating them after they have been adjudicated. In the absence of fraud or mistake, an executed agreement of settlement of an unliquidated or disputed claim constitutes as conclusive and as effectual an estoppel against the parties of the compromise from again litigating the claim thus settled as the final judgment of a court of competent jurisdiction, to the effect that the rights of the parties are as they are set forth in the agreement; and such a contract is always upheld by the courts. . . . Nor will such agreements be lightly disturbed upon confused, conflicting, or uncertain evidence of fraud or mis-

take. The burden is always upon the assailant of the contract to establish the vice which he alleges induced it, and a bare preponderance of evidence will not sustain the burden. A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear, unequivocal, and convincing."

Nevertheless the condition of the plaintiff is a pitiable one. He is illiterate and far below the average in intelligence, and if he has sustained injuries not embraced in the compromise set forth in the complaint he should have his day in court and an opportunity to establish his rights before a jury. I am therefore of opinion that the release is no bar to an action by the plaintiff for any damages sustained by him aside from the injury to his foot which was clearly within the contemplation of the parties when the settlement was made. Whether a release of this kind can be set aside in part may admit of question, although I see no reason why it should not be sustained insofar as it sets forth and embodies the actual agreement of the parties.

See *Lumley v. Wabash R. Co.*, *supra*, and cases there cited.

This question will be determined, however, when the final decree is submitted.

Whereupon the defendant excepted to the ruling and finding of the Court that the release was no bar to an action by the plaintiff for any damages sustained by him aside from the injury to his foot, which exception was allowed by the [82] Court.

Judgment and Decree.

Thereafter and upon the 14th of November, 1916, a judgment and decree was signed and entered in favor of the plaintiff against the defendant, in the following language:

This cause came on to be heard at this term and was argued by counsel; and thereupon upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:

That the release set forth in the complaint herein be and the same is hereby upheld and sustained insofar as it purports to release any and all claims for damages for injury to the right foot and for injuries to the arm and shoulder.

IT IS FURTHER CONSIDERED, ADJUDGED AND DECREED, that said release be and the same is hereby canceled, annulled, set aside and held for naught insofar as it purports to release any claim for damages for other injuries complained of and set forth in the complaint herein.

IT IS FURTHER ORDERED, that the plaintiff have and recover herein his costs to be taxed and that execution issue therefor.

To all of which the defendant excepts and its exception is allowed.

Done in open court this 14th day of November, 1916.

FRANK H. RUDKIN,

Judge. [83]

Now, in furtherance of justice and that right may be done, the defendant presents the foregoing as its

statement of evidence and bill of exceptions in this case, and prays that the same may be cited, signed and certified by the judge as provided by law, and filed as a statement of evidence and bill of exceptions.

CHARLES S. ALBERT,

THOMAS BALMER,

Solicitors for Defendant.

Due service of the within statement of evidence and bill of exceptions, by a true copy thereof, is hereby admitted at Spokane, Washington, this 23d day of November, 1916.

(Signed) STEAKE & NUZUM,

Solicitors for Plaintiff. [84]

Stipulation Re Statement of Evidence.

IT IS HEREBY STIPULATED, that the foregoing is conformable to the truth, and contains all of the evidence offered or introduced at the trial of the above-entitled action; also the findings of the Court in full and all objections, orders, rulings, exhibits and all other proceedings upon said trial, and that the same is true, complete and properly prepared, and that the same shall be settled and allowed as the statement of evidence and bill of exceptions herein by the Hon. Frank H. Rudkin, Judge of said court, without further notice.

STEAKE & NUZUM,

THOMAS BALMER,

Attorneys for Plaintiff.

CHARLES S. ALBERT,

THOMAS BALMER,

Attorneys for Defendant. [85]

[Title of Court and Cause.]

Certificate and Order Settling and Allowing Statement and Bill of Exceptions.

I hereby certify that the foregoing statement of evidence and bill of exceptions has been examined by me, and found conformable to the truth, and contains all the evidence offered or introduced on the trial of said cause; also the findings of said Court in full, the objections, rulings, orders, exhibits and all other proceedings had upon said trial, and that the same is true, complete and properly prepared, and I hereby settle, allow and approve the same as the statement of evidence and bill of exceptions herein.

Dated at Spokane, Washington, December 8th, 1916.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Statement of Evidence and Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, December 8, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [86]

[Title of Court and Cause.]

Opinion.

STEAKE & NUZUM, for Plaintiff.

CHARLES S. ALBERT and THOMAS
BALMER, for Defendant.

RUDKIN, District Judge.

On and for some time prior to the 10th day of

May, 1915, the plaintiff was in the employ of the defendant as a cook on a work train at different points in the State of Montana, and on the above date while so employed near the town of Geyser, the car in which he was at work became derailed, inflicting upon him certain personal injuries which form the basis of the present controversy. The accident happened at about nine o'clock in the morning, and soon thereafter the plaintiff went, or was taken, to Great Falls, Montana, and called upon the claim agent and surgeon of the defendant company. As a result of the derailment a stove cover or lid fell on the plaintiff's foot, and for this injury the surgeon treated him by bandaging the injured member. After leaving the surgeon the plaintiff was taken to the claim department and there, in consideration of the sum of ten dollars to him paid, executed the following release:

“KNOW ALL MEN BY THESE PRESENTS, That in consideration of the sum of ten and no/100 dollars, to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, have released, acquitted and discharged, and do, by these presents, release, acquit and discharge said railway company, its successors and assigns, of and from any and all liability, causes of action, costs, charges, claims or demands of every name or nature, in any manner arising or growing out of, or to arise or grow out of personal injuries received by me (W. J. Reid) at or near Geyser, in the State of Montana, on or about the 10th day of May, 1915, while acting as a cook, I met with an accident whereby I

sustained personal injury; or arising, or to arise, out of any and all personal injuries sustained by me at any time or place [87] while in the employ of said railway company prior to the date of these presents.

“No promise of future employment has been made to me by said railway company as part consideration of this settlement and release, or otherwise.”

The back of the release contained the following endorsement in the handwriting of the plaintiff and signed by him:

“I have read within Release Before signing and fully understand that the sum of ten dollars is in full settlement of all claim of every kind.”

The voucher signed by the plaintiff contained substantially the same recital, viz.:

“For and in consideration of any and all claims, past, present and prospective against the Great Northern Railway Company arising or to grow out of personal injuries received by me at or near Geyser, Montana, on or about May 10th, 1915.”

Soon after the execution of this release and the receipt of the money, and on the same day, the plaintiff returned to Geyser and resumed his former employment that evening with the defendant and continued in that employment until the second day of July following. Thereafter an action was commenced on the law side of this court to recover damages for personal injuries growing out of the accident in question, and the foregoing release was pleaded in bar. Thereafter the present suit was commenced on the equity side of the court to cancel

and set aside the release on the ground of fraud and mistake.

The injuries sustained by the plaintiff as set forth in his complaint are the following :

A broken arch of the right foot; a double inguinal hernia; a severe wrench of the back; and a severe shock to the nervous system. The grounds upon which the release are assailed are the following: First. That the surgeon of the defendant company, after a cursory examination, informed the plaintiff that his injuries were slight and amounted to nothing beyond a mere nervous shock, and a slightly sprained ankle and instep, and that he would entirely recover in the course of a day or two; and that the claim agent of the defendant company informed the plaintiff that he would give him [88] ten dollars, representing two or three days' pay; that the plaintiff might remain in Great Falls during that period, and that his position would be held open for him. Second. That the plaintiff's physical and mental condition was such that he was unable to read or comprehend the contents of the receipt; that he did not have time to read the same; that he signed it relying upon the representations of the claim agent and surgeon that it was a receipt for ten dollars and nothing more; and that he would not have signed it but for these representations. And lastly, that the injuries above set forth were not taken into consideration by or known to the plaintiff or the representatives of the defendant at the time the release was executed.

One who seeks to set aside a release or other sol-

em contract on the ground of fraud or mistake must make out his case by clear and convincing proof. A mere preponderance of the testimony will not suffice. Guided by this wholesome and salutary rule proof in this case utterly fails as to the first and second grounds above set forth. Manifestly no misrepresentations of any kind were made to the plaintiff by the surgeon or the claim agent either as to the nature or extent of his injuries. As a matter of fact it clearly appears, not only from the testimony but from the allegations of the complaint as well, that none of the parties concerned knew or even suspected that the injuries sustained by the plaintiff were more than superficial. The injury to the right foot was the only injury complained of, aside from a slight bruise on the arm or shoulder which the plaintiff himself deemed so trifling and inconsequential that he refused to remove his coat so that the surgeon might examine it. And a word here as to the extent of the injuries to the foot may not be out of place. No doubt the arch of the right foot is now broken down; but for that matter so is the arch of the left foot. The testimony shows clearly that the plaintiff complained continuously of his feet [89] prior to the accident, and that his shoes were all slit up to relieve them. This goes far to show, if it does not demonstrate, that the present condition of his right foot is the result of disease or other infirmity rather than of the accident complained of.

The claim that the plaintiff was unable to read or comprehend the contents of the release by reason of his physical and mental condition is likewise un-

founded. The testimony shows that he fully comprehended all that transpired about him, and he was able to contradict the testimony of other witnesses whenever it was to his interest to do so. He told the entire work crew at supper that night that he had settled with the railroad company for thirty dollars, and in a letter written a few months later he again refers to the settlement. He took up his usual avocation as soon as he could return to Geyser after the execution of the release, and as already stated, it is all but certain that no person connected with the affair, including the plaintiff himself, had the slightest suspicion that his injuries were at all serious. Written contracts and the statute of frauds will be of little avail if contracts are to be ruthlessly set aside upon such a showing. The only question in the case that gives rise to any doubt in my mind is the question of mistake. If the plaintiff received injuries other than the superficial injury to his foot it is shown beyond question that such injuries were unknown to the contracting parties, and were not taken into consideration in the settlement made. Is this a sufficient ground in equity for setting aside the release? All the authorities agree that a release of this kind cannot be avoided for mere mistakes of opinion or prophecy; in other words, merely because the injuries prove more serious and lasting than the parties thought them to be. Some of the authorities go so far as to hold that a general release of this kind cannot be avoided for mutual mistake at all. Thus in *Houston & T. C. R. Co. vs. McCarty*, 60 S. W. 429, the only injury known to or within the

[90] contemplation of the contracting parties was an injury to the ankle; but it later developed that there were injuries to the spine and bowels, which were of much graver and more permanent character than the injuries settled for, yet the Supreme Court of Texas held that the release was an absolute bar to the action, stating its conclusion in these words:

“Our conclusion is that the release embraces all damages resulting from the injuries of the plaintiff, and that it cannot be varied by parole evidence tending to show that other injuries than that to the ankle were not in the contemplation of the parties.”

This is the extreme view, however, and is not supported by the weight of authority.

Lumley vs. Wabash R. Co., 76 Fed. 66.

Great Northern Ry. Co. vs. Fowler, 136 Fed. 118.

In the cases last cited the releases were avoided for mutual mistake of the parties, and while the form of the releases may have differed to some extent from the release now under consideration, no importance seems to have been attributed to that difference. If, therefore, the plaintiff in this action sustained injuries other than the slight injury to his foot, such injuries were not within the contemplation of the contracting parties and the release should not be permitted to stand in the way of a recovery therefor.

Now as to the nature and extent of the injuries suffered by the plaintiff as a result of the accident

complained of. It will readily be conceded that at the present time his body is poorly nourished and that his general health and physical condition are far from good. It cannot be said, however, that these conditions are attributable wholly, or even in a considerable part, to the accident. According to the testimony of one of the physicians his present ailments are, in the order of importance, first, arteriosclerosis; second, double inguinal hernia; and third, double flat foot. It does not appear from the testimony that the first of these was produced in any wise by the accident, and while [91] the condition of the right foot may have been aggravated by the accident it was not caused thereby. The plaintiff had one hernia on the right side for a period of some two years prior to the accident, caused by lifting ice into an ice-box, and the second developed soon after the accident. The course of its development, however, is left in doubt and uncertainty. The plaintiff simply states that he felt a pain in that region the day after the accident, and that he complained of such an injury to the railroad company in June following the accident; but the first definite information we have on the subject is found in the testimony of the physicians who examined him some eight or nine months later when his condition was found substantially the same as it is to-day. Beyond this the testimony throws no light upon his condition or the cause thereof. Good faith, common honesty, and the peace of society demand that compromises and settlements of this kind should be upheld unless impeached for fraud or mistake by

clear and convincing proof. As well said by Judge Sanborn in *Chicago & Northwestern Ry. Co. vs. Wilcox*, 116 Fed. 913:

“The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims. It loves peace, hates broils and dissensions, and discourages the prolongation of litigation and the revival of controversies which have once been closed. The judgment of a court settles the claims submitted to it, and estops the parties from again litigating them after they have been adjudicated. In the absence of fraud or mistake, an executed agreement of settlement of an unliquidated or disputed claim constitutes as conclusive and as effectual an estoppel against the parties to the compromise from again litigating the claim thus settled as the final judgment of a court of competent jurisdiction, to the effect that the rights of the parties are as they are set forth in the agreement; and such a contract is always upheld by the courts. * * * Nor will such agreements be lightly disturbed upon confused, conflicting, or uncertain evidence of fraud or mistake. The burden is always upon the assailant of the contract to establish the vice which he alleges induced it, and a bare preponderance of evidence will not sustain the burden. A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear, unequivocal and convincing.”

Nevertheless the condition of the plaintiff is a pitiable one. He is illiterate and far below the average in intelligence, and if he has sustained injuries not embraced in the compromise set [92] forth in the complaint he should have his day in court and an opportunity to establish his rights before a jury. I am therefore of opinion that the release is no bar to an action by the plaintiff for any damages sustained by him aside from the injury to his foot which was clearly within the contemplation of the parties when the settlement was made. Whether a release of this kind can be set aside in part may admit of question, although I see no reason why it should not be sustained in so far as it sets forth and embodies the actual agreement of the parties.

See Lumley v. Wabash R. Co., *supra*, and cases there cited.

This question will be determined, however, when the final decree is submitted. [93]

*In the District Court of the United States for the
Eastern District of Washington, Northern
Division.*

No. 2545.

W. J. REID,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the release set forth in the complaint herein be and the same is hereby upheld and sustained in so far as it purports to release any and all claims for damages for injury to the right foot and for injuries to the arm and shoulder.

It is further considered, adjudged and decreed that said release be and the same is hereby cancelled, annulled, set aside and held for naught in so far as it purports to release any claim for damages for other injuries complained of and set forth in the complaint herein.

It is further ordered that the plaintiff have and recover herein his costs to be taxed and that execution issue therefor.

To all of which the defendant excepts and its exception is allowed.

Done in open court this 14th day of November, 1916.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Decree. Filed in the U. S. District Court for the Eastern District of Washington. November 14, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [94]

[Title of Court and Cause.]

Assignment of Errors.

Comes now the defendant and files the following assignment of errors, upon which it will rely in the prosecution of its appeal in the above-entitled cause from the judgment made by this Honorable Court upon the 14th day of November, A. D. 1916, in the above-entitled cause.

I.

That the United States District Court in and for the Eastern District of Washington, Northern Division, erred in allowing the plaintiff to answer the question:

“Q. State to the Court your injury and the cause of it.”

II.

That the Court erred in allowing the plaintiff to answer the question:

“Q. State if you remember anything that occurred between the claim agents and Mr. McElroy at that time. State what the conversation was.”

III.

That the Court erred in allowing the plaintiff to answer the question:

“Q. What was your object, Mr. Reid, in stating in this letter that you had recovered?”

IV.

That the Court erred in allowing the witness George T. McElroy to answer the question:

“Q. State what conversation took place between these gentlemen and these claim agents.”

[95]

V.

That the Court erred in allowing the witness, Dr. George A. Downs, to answer the question:

“Q. State to Judge Rudkin what you found at that time in your examination.”

VI.

That the Court erred in denying the motion of the defendant to strike all the testimony in the record received subject to its objection, and all testimony relating to conditions or injuries developing subsequent to the time of the settlement, and all testimony relating to the injuries, if any, which were not known to either or both parties at the time of the settlement.

VII.

That the Court erred in denying the motion of the defendant to dismiss the bill to set aside the release.

VIII.

That the Court erred in finding that the release was no bar to an action by the plaintiff for any damages sustained by him aside from the injury to his foot.

IX.

That the Court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant.

X.

That the Court erred in rendering and entering judgment herein, sustaining said release in so far as

it purported to release any and all claims for damages for injury to the right foot and for injuries to the arm and shoulder, and cancelling, annulling, setting aside and holding for naught said release in so far as it purported to release any claim for damages for other injuries, complained of and set forth in the complaint in said action.

XI.

That the Court erred in rendering and entering judgment setting aside the release described in said complaint. [96]

XII.

That the Court erred in rendering and entering a judgment cancelling, annulling and setting aside and holding for naught said release, in so far as it purports to release any claim for damages for other injuries complained of and set forth in the complaint in said action.

WHEREFORE, the said Great Northern Railway Company, appellant, prays that the said decree be reversed and the District Court directed to dismiss the bill and complaint herein.

(Signed) CHARLES S. ALBERT,
THOMAS BALMER,

Solicitors for Defendant and Appellant.

Due service of the within Assignment of Errors by true copy thereof, is hereby admitted at Spokane, Washington, this 8th day of December, 1916.

(Signed) STEAKE & NUZUM,
NUZUM, CLARK & NUZUM,
Solicitors for Plaintiff.

[Endorsements]: Assignment of Errors. Filed in the U. S. District Court for the Eastern District of Washington, December 8, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [97]

[Title of Court and Cause.]

Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit and Order Allowing Same.

To the Honorable District Court of the United States for the Eastern District of Washington, Northern Division:

The above-named defendant, Great Northern Railway Company, feeling itself aggrieved by the findings of the Court, the decree and judgment made and entered by said Court on the 14th day of November, 1916, in the above-entitled cause, comes now by Charles S. Albert and Thomas Balmer, its attorneys, and does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herein, and prays that this appeal may be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers on which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that the proper order touching the security to be required of it to perfect its appeal, be made, fixing the amount of security which the defendant shall give and furnish upon said appeal, and

that upon the giving of such security, all further proceedings of this Court be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 8th day of December, A. D. 1916.

(Signed) CHARLES S. ALBERT,
THOMAS BALMER,

Solicitors for Defendant. [98]

The foregoing petition is granted and said appeal is allowed upon the defendant giving a bond, conditioned as required by law in the sum of five hundred dollars.

Dated this 8th day of December, 1916.

(Signed) FRANK H. RUDKIN,
United States District Judge.

Copy of the within petition for appeal and order allowing the same and fixing bond acknowledged this 8th day of December, 1916.

(Signed) STEAKE & NUZUM,
NUZUM, CLARK & NUZUM,
Solicitors for Plaintiff.

[Endorsements]: Petition for Appeal and Order Allowing Same. Filed in the U. S. District Court for the Eastern District of Washington, December 8, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [99]

[Title of Court and Cause.]

Order Allowing Bond.

Defendant, Great Northern Railway Company, having this day filed its petition for the allowance of an appeal from the findings and decision, decree and judgment thereon, made and entered herein to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made, fixing the amount of security which defendant should give and furnish upon said appeal, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals in and for the Ninth Judicial District, and said petition having been this day duly allowed;

Now, therefore, it is ORDERED, that upon the said defendant, Great Northern Railway Company, filing with the clerk of this Court a good and sufficient bond, in the sum of five hundred dollars, to the effect that if the defendant, Great Northern Railway Company, appellant, shall prosecute said appeal to effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; else to remain in full force and effect, said bond to be approved by the Court. That all further proceedings in this Court be, and they are hereby suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals. [100]

Dated this 8th day of December, 1916.

(Signed) FRANK H. RUDKIN,

District Judge.

Due service of the within order, by a true copy thereof, is hereby admitted at Spokane, Washington, this 8th day of December, 1916.

(Signed) STEAKE & NUZUM,

NUZUM, CLARK & NUZUM,

Solicitors for Plaintiff.

[Endorsements]: Order Allowing Bond. Filed in the U. S. District Court for the Eastern District of Washington. December 8, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [101]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, Great Northern Railway Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto W. J. Reid in the full and just sum of five hundred dollars (\$500), to be paid to the said W. J. Reid, for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of December, 1916.

WHEREAS, lately at the September Term, A. D. 1916, of the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said court between W. J.

Reid, plaintiff, and the Great Northern Railway Company, defendant, a final decree and judgment was entered against the said defendant, and the said defendant, Great Northern Railway Company, having obtained from said court an order allowing the appeal to reverse the judgment in the aforesaid suit, and a citation directed to said W. J. Reid, is about to be issued, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such that if the said Great Northern Railway Company shall prosecute its appeal to effect, and shall answer all damages and costs that may [102] be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

(Signed) GREAT NORTHERN RAIL-
WAY COMPANY.

By CHARLES S. ALBERT,
THOMAS BALMER,

Its Attorneys.

(Signed) NATIONAL SURETY COM-
PANY.

[Corporate Seal] JAMES A. BROWN,
Resident Vice-President.
F. S. JONES,
Resident Assistant Secretary.

Plaintiff is satisfied with the within bond and the surety thereon.

(Signed) STEAKE & NUZUM,

Solicitors for Plaintiff.

The foregoing bond is approved as to form, amount and sufficiency of surety this 8th day of December, 1916.

(Signed) FRANK H. RUDKIN,

Judge of the U. S. District Court, Eastern District of Washington.

[Endorsements]: Bond on Appeal. Due service of the within bond by a true copy thereof is hereby admitted at Spokane, Washington, this 8th day of December, A. D. 1916. (Signed) Steake & Nuzum and Nuzum, Clark & Nuzum, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington. December 8, 1916. W. H. Hare, Clerk, By S. M. Russell, Deputy.
[103]

[Title of Court and Cause.]

Stipulation for Transcript of Record on Appeal.

It is hereby stipulated between the plaintiff, by his solicitors, and the defendant, by its solicitors, that the transcript of the record on appeal in the above-entitled cause, shall be made up of the following papers:

Subpoena with marshal's return;

Bill in Equity;

Answer;

Opinion of Court;

Judgment and Decree.

Statement and Bill of Exceptions and Exhibits 1, 2,
3 and 4;

Petition for Appeal and order allowing same;

Assignment of Errors;

Bond on Appeal;

Order allowing Bond;

Original Citation with Acceptance of Service;

Copy of Citation lodged with clerk for Appellee;

Stipulation as to Making Up of Record;

—which comprise all the papers, records and other proceedings which are necessary to the hearing of the appeal in said action in the United States Circuit Court of Appeals. and that no other papers, records or proceedings than those above mentioned need be included by the clerk of said court in making up his return to said citation as part of such record.

(Signed) STEAKE & NUZUM,

NUZUM, CLARK & NUZUM,

Solicitors for Plaintiff.

CHARLES S. ALBERT,

THOMAS BALMER,

Solicitors for Defendant.

[Endorsements]: Stipulation for Transcript of Record on Appeal. Filed in the U. S. District Court for the Eastern District of Washington. December 8, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy.

[Endorsed]: No. 2896. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Appellant, vs. W. H. Reid, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed December 22, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Citation on Appeal.

The President of the United States to W. J. Reid
and to A. H. Steake and H. N. Nuzum and
Nuzum, Clark & Nuzum, His Attorneys,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco in the State of California, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein W. J. Reid is plaintiff and you are appellee, and said Great Northern Railway Company is defendant and is complainant, and show cause, if any there be, why the decree and judgment in said appeal mentioned should not be

corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the HONORABLE EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 8th day of December, 1916, in the year of Independence of the United States the one hundred and forty-first.

FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington, Northern Division.

[Seal] Attest:

W. H. HARE,

Clerk.

Due service of the within citation by true copy thereof is hereby admitted at Spokane, Washington, this 8th day of December, A. D. 1916.

STEAKE & NUZUM.

NUZUM, CLARK & NUZUM.

Solicitors for Plaintiff.

[Endorsed]: No. 2545. In the District Court of the United States for the Eastern District of Washington, Northern Division. W. J. Reid, Plaintiff, vs. Great Northern Ry. Co., Defendant. Citation on Appeal. Filed in the U. S. District Court, Eastern District of Washington, Dec. 8, 1916. Wm. H. Hare, Clerk. S. M. Russell, Deputy.

No. 2896. United States Circuit Court of Appeals for the Ninth Circuit. Original. Citation on Appeal. Filed. Dec. 29, 1916. F. D. Monekton, Clerk.

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

W. J. REID,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Defendant.

Stipulation for Printing Record.

IT IS HEREBY STIPULATED AND
AGREED between the appellant by its solicitors,
and the appellee by its solicitors, that in printing the
record in the above-entitled cause the clerk shall
cause the following to be printed for the considera-
tion of the Court on appeal:

Bill in Equity.

Answer.

Opinion of Court.

Statement and Bill of Exceptions, Including Ex-
hibits.

Judgment and Decree.

Original Citation.

Petition for Appeal and Order Allowing Same.

Assignment of Errors.

Bond on Appeal.

Order Allowing Bond.

Stipulation as to Making Up Record.

AND IT IS FURTHER STIPULATED that in
printing said record there may be omitted the title
of the court and cause on all papers, excepting the
first page, and that in lieu of said title of court and

cause there be inserted in place and stead thereof,
the following words: "Title of Court and Cause."

Dated this 8th day of December, 1916.

CHARLES S. ALBERT,

THOMAS BALMER,

Solicitors for Appellant

STEAKE & NUZUM,

NUZUM, CLARK & NUZUM,

Solicitors for Apellee.

[Endorsed]: No. 2896. United States Circuit
Court of Appeals for the Ninth Circuit. W. J. Reid,
Plaintiff, vs. Great Northern Ry. Co., Defendant.
Stipulation for Printing Record. Filed Dec. 22,
1916. F. D. Monckton, Clerk.

No. 2896

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

W. J. REID,

Appellee.

Brief for Appellant

Upon Writ of Error to the United States District Court for the
Eastern District of Washington, Northern Division.

CHARLES S. ALBERT,
THOMAS BALMER,

Attorneys for Appellant. FEB 13 1917

Post Office Address:

Great Northern Passenger Station,
Spokane, Spokane County, Washington.

F. D. Monckton

cl

No. 2896

United States

Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

W. J. REID,

Appellee.

Brief for Appellant

STATEMENT OF THE CASE

This case comes before this court upon appeal from the District Court of the United States for the Eastern District of Washington, Northern Division, appellant herein being the defendant in the court below, and hereinafter referred to as the defendant, and appellee herein being W. J. Reid, hereinafter referred to as the plaintiff. The Hon. Frank H. Rudkin, District Judge, tried the case.

The action was brought upon a bill in equity, alleging that on May 10th, 1915, defendant was op-

erating a work train; that the plaintiff was a cook on such train, and that in the operation of the train the cook car in which the plaintiff was working left the track; that the top of the cook stove fell upon plaintiff's foot, and the plaintiff suffered a double inguinal hernia, broken arch of the right foot, wrench to the back and a shock to his nervous system; that since the injury he has been working some.

That on the day of the accident he went from Geyser, where the derailment occurred, to Great Falls, and was there taken by a claim agent, while he was in an alleged exhausted and nauseated condition, to a physician, and after an alleged cursory examination was informed that his injuries were slight; that he had a nervous shock and a slightly sprained ankle and instep, but that in a day or two he would recover; that he was paid the sum of ten dollars for the purpose, as claimed by the plaintiff, of paying him two or three days' time that he might remain in Great Falls for rest, and that at said time he signed an instrument, which he claimed was stated to him to be a receipt for ten dollars; that he did not read the paper; that on account of his alleged condition he claimed he could not read or comprehend it, did not have time to do so; that he relied upon the alleged statements of the claim agent and physician, and that it was a receipt for ten dollars, and that this was the only paper signed by him. He claimed that the signature of this paper was obtained through

fraud, misrepresentation and deceit, and that he never executed any release, and he claimed that the subject of settlement was not discussed. The release is set forth in the complaint (Tr. p. 8). He claimed he did not know whether it was in the same condition as it was when he signed it. He further alleged that he did not know within eight hours of the accident that he had broken the arch of his right foot or suffered double inguinal hernias, or any injury of any kind, and that the injuries were never taken into consideration at the time he signed the instrument; (p. 10) that an action for damages for personal injuries has been brought on the law side of the court; that defendant had set up in its answer the release as a bar; that a tender of the amount paid was made, which was refused. (P. 12.) Plaintiff prayed that the release be decreed to be null and void, and for such other and further relief as might be agreeable to equity. (Tr. 1-14).

The defendant by its answer admitted the derailment of the car, and that the plaintiff received some slight injuries at that time; denied that plaintiff suffered a double inguinal hernia or broken arch of his right foot, or severe wrench of his back or severe shock to his nervous system, or any great or excruciating physical pain or agony or semi-paralyzed condition of his legs. Denied that prior to the time of the accident he was a well man, or that he had been in any other state of health since his injuries than he was before. Defendant admitted that plaintiff went with the claim agent of the defendant on

the 10th of May to the office of a physician and surgeon at Great Falls; that upon examination made at that time the physician found that the plaintiff had suffered a bruise to his arm and shoulder and some slight injuries to his ankle, and informed the plaintiff to that effect; that the plaintiff claimed that the defendant was liable for the injuries; that this was denied by the defendant; that negotiations were had between them and a compromise and settlement was agreed upon on that day and settlement made; that the defendant paid the plaintiff the sum of ten dollars, in consideration of the settlement, and that in writing he released the defendant. Defendant specifically denied that at the time of the settlement plaintiff was sick or was in an exhausted condition, was affected with nausea or was not in full possession of his faculties; denied that there were any misrepresentations made by the defendant, or that the sum of ten dollars was paid for any other purpose than the release, or that the release was executed while the plaintiff was in a nervous condition or not in full possession of his faculties. It denied that the plaintiff relied upon the statement of the claim agent or physician, and alleged that he read the paper and that he fully understood the contents thereof. It alleged that he executed not only the release set forth in the complaint, but a duplicate of the same and an original and duplicate voucher, and endorsed a draft. It specifically denied that the signatures were procured either through fraud, misrepresentation or deceit, and alleged the execution

and delivery of the release; that a claim was presented for the injuries and settlement was discussed. The execution of the release, as stated in the complaint in paragraph 17, was admitted. It alleged that all injuries suffered by the plaintiff were taken into consideration; admitted the suit started on the law side of the court, and tender and refusal, and prayed the dismissal of the bill. (Tr. 15-24).

The case came on for trial upon September 26th, 1916, and after the defendant had moved to strike certain testimony and dismiss the bill, which motions were overruled, the case was submitted to the court for its decision. (Tr. 25-80).

Upon the 12th of October, 1916, Judge Rudkin filed his opinion, in which he found that there was no fraud, misrepresentation or deceit upon the part of the defendant or its representatives, and that some of the injuries claimed were not known or suspected by either of the parties at the time of the settlement, and that of these alleged injuries the evidence went far to show that the conditions now claimed arose out of disease, rather than accident. (Tr. 85-93). Nevertheless, on November 14th, 1916, judgment was entered, sustaining the release for injuries to the right foot and arm and shoulder. The release was set aside so far as it purported to release any claim for damages for other injuries complained of, and set forth in the complaint. (Tr. 94.)

Assignment of errors was filed (107-109) and ap-

peal to this court was perfected by petition, order allowing the same, order allowing bond, bond on appeal and citation. (110-120).

ASSIGNMENT OF ERRORS

The following errors specified as relied upon, and each of which is asserted in this brief and intended to be urged, are set out in the assignment of errors appearing in the printed record.

I.

That the United States District Court in and for the Eastern District of Washington, Northern Division, erred in allowing the plaintiff to answer the question:

"Q. State to the Court your injury and the cause of it." (Tr. p. 26).

II.

That the Court erred in allowing the witness, Dr. George A. Downs, to answer the question:

"Q. State to Judge Rudkin what you found at that time in your examination." (Tr. p. 43).

III.

That the Court erred in denying the motion of the defendant to strike all the testimony in the record received subject to its objection, and all testimony relating to conditions or injuries developing subse-

quent to the time of the settlement, and all testimony relating to the injuries, if any, which were not known to either or both parties at the time of the settlement. (Tr. p. 79).

IV.

That the Court erred in denying the motion of the defendant to dismiss the bill to set aside the release. (Tr. p. 80).

V.

That the Court erred in finding that the release was no bar to an action by the plaintiff for any damage sustained by him aside from the injury to his foot. (Tr. p. 93).

VI.

That the Court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant. (Tr. p. 94).

VII.

That the Court erred in rendering and entering judgment herein, sustaining said release in so far as it purported to release any and all claims for damages for injury to the right foot and for injuries to the arm and shoulder, and cancelling, annulling, setting aside and holding for naught said release in so far as it purported to release any claim for damages for other injuries, complained of and set forth in the complaint in said action. (Tr. p. 94).

VIII.

That the Court erred in rendering and entering judgment setting aside the release described in said complaint. (Tr. p. 94).

IX.

That the Court erred in rendering and entering a judgment cancelling, annulling and setting aside and holding for naught said release, in so far as it purports to release any claim for damage for other injuries complained of and set forth in the complaint in said action. (Tr. p. 94).

STATEMENT OF FACTS

A comprehensive view of the facts in this case may be obtained from a perusal of Judge Rudkin's opinion. It is given here in full. The italics are ours.

RUDKIN, District Judge: "On and for some time prior to the 10th day of May, 1915, the plaintiff was in the employ of the defendant as a cook on a work train at different points in the State of Montana, and on the above date while so employed near the town of Geyser, the car in which he was at work became derailed, inflicting upon him certain personal injuries which form the basis of the present controversy. The accident happened at about nine o'clock in the morning, and soon thereafter the plaintiff went, or was taken, to Great Falls, Montana, and called upon the claim agent and surgeon of the defendant company. As a result of the derailment a stove cover or lid fell on the plaintiff's foot, and for this injury the surgeon treated him by bandaging the injured member. After leaving the surgeon the plaintiff was taken to the claim department and there, in consideration of the sum of ten dollars to him paid, executed the following release:

"KNOW ALL MEN BY THESE PRESENTS, that in consideration of the sum of Ten and No/100 Dollars, to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, have released, acquitted and discharged, and do, by these presents, release, acquit and discharge said railway company, its successors and assigns of

and from any and all liability, causes of action, costs, charges, claims or demands of every name or nature, in any manner arising or growing out of, or to arise or grow out of personal injuries received by me (W. J. Reid) at or near Geyser, in the State of Montana, on or about the 10th day of May, 1915, while acting as a cook, I met with an accident whereby I sustained personal injury; or arising, or to arise, out of any and all personal injuries sustained by me at any time or place while in the employ of said railway company prior to the date of these presents.

"No promise of future employment has been made to me by said railway company as part consideration of this settlement and release, or otherwise."

The back of the release contained the following endorsement in the handwriting of the plaintiff and signed by him:

"I have read within Release before signing and fully understand that the sum of ten dollars is in full settlement of all claim of every kind."
—W. J. Reid.

The voucher signed by the plaintiff contained substantially the same recital, viz.:

"For and in consideration of any and all claims past, present and prospective against the Great Northern Railway Company arising or to grow out of personal injuries received by me at or near Geyser, Montana, on or about May 10th, 1915."

Soon after the execution of this release and the receipt of the money, and on the same day, the plaintiff returned to Geyser and resumed his former em-

ployment that evening with the defendant and continued in that employment until the second day of July following. Thereafter an action was commenced on the law side of this court to recover damages for personal injuries growing out of the accident in question, and the foregoing release was pleaded in bar. Thereafter the present suit was commenced on the equity side of the court to cancel and set aside the release on the ground of fraud and mistake.

The injuries sustained by the plaintiff as set forth in his complaint are the following:

A broken arch of the right foot; a double inguinal hernia; a severe wrench of the back; and a severe shock to the nervous system. The grounds upon which the release are assailed are the following: *First.* That the surgeon of the defendant company, after a cursory examination, informed the plaintiff that his injuries were slight and amounted to nothing beyond a mere nervous shock, and a slightly sprained ankle and instep, and that he would entirely recover in the course of a day or two; and that the claim agent of the defendant company informed the plaintiff that he would give him ten dollars, representing two or three days' pay; that the plaintiff might remain in Great Falls during that period, and that his position would be held open for him. *Second.* That the plaintiff's physical and mental condition was such that he was unable to read or comprehend the contents of the receipt; that he did not have time to read the same; that he signed it relying upon

the representations of the claim agent and surgeon that it was a receipt for ten dollars and nothing more; and that he would not have signed it but for these representations. And *lastly*; that the injuries above set forth were not taken into consideration by or known to the plaintiff or the representatives of the defendant at the time the release was executed.

One who seeks to set aside a release or other solemn contract on the ground of fraud or mistake must make out his case by clear and convincing proof. A mere preponderance of the testimony will not suffice. Guided by this wholesome and salutary rule *proof in this case utterly fails as to the first and second grounds above set forth. Manifestly no misrepresentations of any kind were made to the plaintiff by the surgeon or the claim agent either as to the nature or extent of his injuries. As a matter of fact, it clearly appears, not only from the testimony but from the allegations of the complaint as well, that none of the parties concerned knew or even suspected that the injuries sustained by the plaintiff were more than superficial.* The injury to the right foot was the only injury complained of, aside from a slight bruise on the arm or shoulder which the plaintiff himself deemed so trifling and inconsequential that he refused to remove his coat so that the surgeon might examine it. And a word here as to the extent of the injuries to the foot may not be out of place. No doubt the arch of the right foot is now broken down; but for that matter so is the arch of the left

foot. The testimony shows clearly that the plaintiff complained continuously of his feet prior to the accident, and that his shoes were all slit up to relieve them. This goes far to show, if it does not demonstrate, that the present condition of his right foot is the result of disease or other infirmity rather than of the accident complained of.

The claim that the plaintiff was unable to read or comprehend the contents of the release by reason of his physical and mental condition is likewise unfounded. The testimony shows that he fully comprehended all that transpired about him, and he was able to contradict the testimony of other witnesses whenever it appeared to his interest to do so. He told the entire work crew at supper that night that he had settled with the railroad company for thirty dollars, and in a letter written a few months later he again refers to the settlement. He took up his usual avocation as soon as he could return to Geyser after the execution of the release, and as already stated, *it is all but certain that no person connected with the affair, including the plaintiff himself, had the slightest suspicion that his injuries were at all serious. Written contracts and the statute of frauds will be of little avail if contracts are to be ruthlessly set aside upon such a showing.* The only question in the case that gives rise to any doubt in my mind is the question of mistake. If the plaintiff received injuries other than the superficial injury to his foot it is shown beyond question that such injuries were

unknown to the contracting parties, and were not taken into consideration in the settlement made. Is this a sufficient ground in equity for setting aside the release? All the authorities agreed that a release of this kind can not be avoided for mere mistakes of opinion or prophecy; in other words, merely because the injuries prove more serious and lasting than the parties thought them to be. Some of the authorities go so far as to hold that a general release of this kind can not be avoided for mutual mistake at all. Thus in *Houston & T. C. R. Co. vs. McCarty*, 60 S. W., 429, the only injury known to or within the contemplation of the contracting parties was an injury to the ankle; but it later developed that there were injuries to the spine and bowels, which were of much graver and more permanent character than the injuries settled for, yet the Supreme Court of Texas held that the release was an absolute bar to the action, stating its conclusion in these words:

“Our conclusion is that the release embraces all damages resulting from the injuries of the plaintiff, and that it can not be varied by parole evidence tending to show that other injuries than that to the ankle were not in the contemplation of the parties.”

This is the extreme view, however, and is not supported by the weight of authority.

Lumley vs. Wabash R. Co., 76 Fed. 66.

Great Northern Ry. Co. vs. Fowler, 136 Fed. 118.

In the cases last cited the releases were avoided for mutual mistake of the parties, and while the form

of the releases may have differed to some extent from the release now under consideration no importance seems to have been attributed to that difference. If, therefore, the plaintiff in this action sustained injuries other than the slight injury to his foot, such injuries were not within the contemplation of the contracting parties and the release should not be permitted to stand in the way of a recovery therefor.

Now as to the nature and extent of the injuries suffered by the plaintiff as a result of the accident complained of. It will readily be conceded that at the present time his body is poorly nourished and that his general health and physical condition are far from good. *It cannot be said, however, that these conditions are attributable wholly, or even in a considerable part, to the accident. According to the testimony of one of the physicians his present ailments are, in the order of importance, first, arteriosclerosis; second, double inguinal hernia; and third, double flat foot. It does not appear from the testimony that the first of these was produced in any wise by the accident, and while the condition of the right foot may have been aggravated by the accident it was not caused thereby. The plaintiff had one hernia on the right side for a period of some two years prior to the accident, caused by lifting ice into an ice box, and the second developed soon after the accident. The course of its development, however, is left in doubt and uncertainty. The plaintiff simply states that he felt a pain in that region the day after the accident, and*

that he complained of such an injury to the railroad company in June following the accident; but the first definite information we have on the subject is found in the testimony of the physicians who examined him some eight or nine months later when his condition was found substantially the same as it is today. Beyond this the testimony throws no light upon his condition or the cause thereof. Good faith, common honesty, and the peace of society demand that compromises and settlements of this should be upheld unless impeached for fraud or mistake by clear and convincing proof. As well said by Judge Sanborn in *Chicago & Northwestern Ry. Co. vs. Wilcox*, 116, Fed. 913:

“The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims. It loves peace, hates broils and dissensions, and discourages the prolongation of litigation and the revival of controversies which have once been closed. The judgment of a court settles the claims submitted to it, and estops the parties from again litigating them after they have been adjudicated. In the absence of fraud or mistake, an executed agreement of settlement of an unliquidated or disputed claim constitutes as conclusive and as effectual an estoppel against the parties to the compromise from again litigating the claim thus settled as the final judgment of a court of competent jurisdiction, to the effect that the rights of the parties are as they are set forth in the agreement; and such a contract is always upheld by the courts * * * Nor will such agreements be lightly disturbed upon confused, conflicting, or uncertain evidence of fraud or mistake. The burden is always upon the assailant

of the contract to establish the vice which he alleges induced it, and a bare preponderance of evidence will not sustain the burden. A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear, unequivocal, and convincing."

Nevertheless the condition of the plaintiff is a pitiable one. He is illiterate and far below the average in intelligence, and if he has sustained injuries not embraced in the compromise set forth in the complaint he should have his day in court and an opportunity to establish his rights before a jury. I am therefore of opinion that the release is no bar to an action by the plaintiff for any damages sustained by him aside from the injury to his foot, which was clearly within the contemplation of the parties when the settlement was made. Whether a release of this kind can be set aside in part may admit of question, although I see no reason why it should not be sustained insofar as it sets forth and embodies the actual agreement of the parties.

See *Lumley vs. Wabash R. Co.*, *supra*, and cases there cited.

This question will be determined, however, when the final decree is submitted." (Tr. pp. 85-93).

From the foregoing opinion it is apparent that no fraud, misrepresentation or deceit was shown, either in:

(a) Statements made by the surgeon or claim agent as to the extent of his injuries, or

(b) That the money paid him was anything else than a settlement and release, or

(c) That the character of the transaction was misrepresented to him, or that he did not understand it.

The only doubt in the Court's mind was whether the injuries claimed, other than the injuries to his ankle, arm and shoulder were actually sustained by the plaintiff, and if so, whether they were included or intended to be included in the settlement as made, and if they were not known at the time of the settlement, were they released by the settlement.

This leaves in the case, therefore, the questions only as to the binding force of a release given in general terms, and whether or not under the conditions which surrounded the execution of this release it can be partly set aside now, on the claim that he now has injuries which were not complained of by him at the time of the settlement.

The propositions that are before this court then are:

1. *Was there clear and convincing proof that there were injuries received at the time of the accident, which were not disclosed by the parties to the settlement, or known to them?*

2. *Is the plaintiff by his conduct estopped from now claiming payment for such alleged newly discovered injuries?*

3. *Did the release which was a release for his personal injuries, and which he stated in his own handwriting was "in full settlement of all claims of every kind," constitute by its terms a bar to any action on account of personal injuries?*

ARGUMENT

I.

THERE WAS NO PROOF THAT AT THE TIME OF THE ACCIDENT PLAINTIFF SUFFERED ANY INJURIES WHICH WERE NOT COVERED BY THE RELEASE AND THE SETTLEMENT.

In the first place this is not an action brought to reform a release, but it is brought to wholly set aside a release upon two grounds:

(1) Fraud. (2) Mistake.

The Court has specifically found that no fraud existed in any respect.

The mistake claimed is that plaintiff did not know at the time of the settlement that he had a double inguinal hernia or broken arch of his right foot, or had suffered any hernia of any kind or any injury which might cause any disability, and that these injuries were not taken into consideration by the plaintiff or defendant.

There are certain well known principles, which govern settlements and attempts to set them aside on the ground of alleged mistake:

The policy of the law is to promote and sustain the compromise and settlement of disputed claims.

Settlement agreements will not be disturbed on confused and conflicting or uncertain evidence of mistake.

The burden is on the plaintiff to prove the mistake, and a bare preponderance of evidence will not sustain the burden.

A release cannot be rescinded unless the evidence of mistake is clear, unequivocal and convincing.

When the signing of the release is admitted, the burden is on the plaintiff to prove the mistake claimed. Mistake is not presumed. The presumption is always in favor of validity and not mistake. In no doubtful case does the Court lean to the conclusion of mistake. It is not to be assumed on doubtful evidence, and the mistake must be clearly and strictly proven as alleged.

Mistakes in prophecy or opinion or of belief, relative to an uncertain future event, cannot be considered grounds for setting aside a release.

Mistakes as to future unknowable effect of existing facts, future uncertain duration of a known condition; or as to the future effect of a personal injury, will not be an occasion for avoiding a release.

Courts of Equity adopt a more stringent rule as to the burden of proof or the weight of the evidence than courts at law, and will not lightly set aside the parol evidence rule. The settlement of a controversy is valid, not because it is the settlement of a valid claim, but because it is the settlement of a controversy. Such settlements are favored by the law, and in the absence of fraud, mis-

representation or concealment, clearly and convincingly shown, a promise thus entered into must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision.

These principles are sustained by the following authorities:

- El Paso & S. W. Ry. Co. vs. Kramer* (Texas), 141 S. W. 123.
Quebec vs. Gulf C. & S. F. R. Co. (Texas), 66 L. R. A. 734; 81 S. W. 20.
San Antonio & A. P. R. Co. vs. Polka, 124 S. W. (Texas) 226.
Kowalke vs. Milwaukee Elec. Ry. & Light Co., 79 N. W. (Wis.) 762.
Foster vs. University Lbr. & Shingle Co., 131 Pac. (Ore.) 736.
Jossey vs. Georgia S. & Ry. (Ga.) 34 S. E. 664.
Lawton vs. Charlestown & W. C. Ry., 74 S. E. 750.
Chicago, St. P. M. & O. Ry. vs. Belliwith, 83 Fed. 438.
Barker vs. N. P. Ry., 65 Fed. 462.
C. & N. W. Ry. Co. vs. Wilcox, 116 Fed. 913.
Wagner vs. National Life Ins. Co., 90 Fed. 395 at p. 407.
Doty vs. C. St. P. & K. C. Ry., 52 N. W. (Minn.) 135.
Aderholt vs. Seaboard Air Line, (N. C.) 67 S. E. 978.
Seeley vs. Citizens' Traction Co., 36 Atl. 229.
Houston & T. C. Ry. Co. vs. McCarty, 53 L. R. A. 507.

Birmingham Ry., Light & Power Co. vs. Jordan,
54 So. 280.

Nath vs. O. R. & N., 72 Wash. 664, 131 Pac. 251.

Erickson vs. G. N., 57 Wash. 520, 107 Pac. 365.

Spratt vs. N. P., 90 Wash. 592, 156 Pac. 563.

2 *Pomeroy Eq. Jur.*, Sec. 850.

In considering the question of the evidence relating to injuries Judge Rudkin found:

"Now as to the nature and extent of the injuries suffered by the plaintiff as a result of the accident complained of. It will readily be conceded that at the present time his body is poorly nourished and that his general health and physical condition are far from good. *It cannot be said, however, that these conditions are attributable wholly, or even in a considerable part, to the accident.* According to the testimony of one of the physicians his present ailments are, in the order of importance, first, arteriosclerosis; second, double inguinal hernia; and third, double flat foot. It does not appear from the testimony that the first of these was produced in any wise by the accident, and while the condition of the right foot may have been aggravated by the accident it was not caused thereby. The plaintiff had one hernia on the right side for a period of some two years prior to the accident, caused by lifting ice into an ice-box, and the second developed soon after the accident. The course of its development, however, is left in doubt and uncertainty. The plaintiff simply states that he felt a pain in that region the day after the accident, and that he complained of such an injury to the railroad company in June following the accident; but the first definite information we have on the subject is found in the testimony of the physicians who examined him some eight or nine months later when his condition was found sub-

stantially the same as it is today. Beyond this the testimony throws no light upon his condition or the cause thereof. Good faith, common honesty, and the peace of society demand that compromises and settlements of this kind should be upheld unless impeached for fraud or mistake by clear and convincing proof. As well said by Judge Sanborn in *Chicago & Northwestern Ry. Co. vs. Wilcox*, 116 Fed. 913:

'The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims. It loves peace, hates broils and dissensions, and discourages the prolongation of litigation and the revival of controversies which have once been closed. The judgment of a court settles the claims submitted to it, and estops the parties from again litigating them after they have been adjudicated. In the absence of fraud or mistake, an executed agreement of settlement of an unliquidated or disputed claim constitutes as conclusive and as effectual an estoppel against the parties of the compromise from again litigating the claim thus settled as the final judgment of a court of competent jurisdiction, to the effect that the rights of the parties are as they are set forth in the agreement; and such a contract is always upheld by the courts * * *. Nor will such agreements be lightly disturbed upon confused, conflicting, or uncertain evidence of fraud or mistake. The burden is always upon the assailant of the contract to establish the vice which he alleges induced it, and a bare preponderance of evidence will not sustain the burden. A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear, unequivocal, and convincing.'"

An examination of the evidence clearly discloses the following:

Reid had been ruptured three years before; had worn a truss for two years. (32) His work required him to lift heavy articles, such as barrels and sacks of flour, potatoes, boxes, sides of beef, cakes of ice. (36, 68) The prior rupture had been occasioned by his catching a cake of ice, producing an internal strain. (32) This, according to the only medical testimony on the subject, rendered him predisposed to rupture. His first rupture was on the right side, and was the much more serious of the two. Dr. Marshall testified that when a man was operated on for hernia on one side, it was quite likely that he had one on the other side; that the usual cause of hernia was lifting; that hernias are usually bi-lateral; that is, on both sides. (66)

Reid had had considerable trouble with his feet before the accident, complained of them swelling, of rheumatism, cutting shoes on account of this, and used liniment on his feet. (67-78) He was at the time of the accident, according to Dr. Longeway, a poorly nourished man. (47)

On the morning of the accident, the car which was being moved in a switch movement, was derailed, the stove lid fell on his right foot, and he says that he was thrown bodily against the sink, which was near the side of the car and it hurt him. (27)

"I got hurt on my foot, and I was shaken up completely, my nerves—nervous shock—and I have been sick practically ever since." (27)

There is no evidence that the hernia on the left

side was occasioned by the accident. The only evidence about this is the following:

“Q. When did you first know, Mr Reid, that you had a double hernia?

A. I don't know now. The next day I didn't know what it was, down there where it hurt.” (Tr. 29).

He then testified that he had a rupture before, a very small one on the right side, about the size of a marble. (30) The complaint (paragraph 6) claims but one double inguinal hernia, and the first claim to the company that he had received a rupture was some time in June, the accident happening upon May 10th. (37) The first evidence of his having two ruptures is shown by the testimony of Dr. Downs, who examined him on February 26th, 1916. (44) There is no evidence of the appearance of a second rupture until that time. His only claim is that the next day he discovered something down there where it hurt. (29) This certainly is insufficient upon which to predicate a double inguinal hernia as the result of the accident,—especially in view of his conduct thereafter. No claim is made that his left foot was injured, and yet an examination on the same day disclosed flat-footedness in both feet, slightly more marked in the right than in the left, and an examination the day before the trial disclosed broken arches in both feet. (45, 46, 47) His conduct entirely negatives the broken arch as the result of the accident. He got down out of the car, walked to the station unassisted; no evi-

dence of a cane or crutch, took the train, rode fifty miles to Great Falls, and there went to the office of the claim agent. (29, 31, 33) His claim is that he went in an automobile. Even McElroy,—a discharged employe, threatening to sue the company and its officers, does not substantiate this automobile claim. He walked down the stairs from the claim agent's office, a block and a half, to Dr. Longeway's office, and up the stairs, then back down over to the depot and took the train back to Geyser the same day, (51-56) went to work that afternoon, and worked from that time on until the second of July continuously, without a break. (67-74) To substantiate his claim of injury he called three witnesses, McElroy, Wells and Cotton. All that McElroy said was that at Great Falls on his arrival he seemed to be in pain, and was limping; (41) Wells testified that he had a rupture two and one-half years before the accident and that he saw him in Spokane after his return from Montana and his condition was very poorly, but he would not say that he was walking with a cane, even at the instance of plaintiff's attorney. Wells testified that he used to room with him. (39-40) Cotton, employment agent, testified that about three years ago, or a year and a half before the accident was the last time he shipped Reid out, and that he was in good health at that time. (43) This in spite of Reid's own admission and Wells' testimony that at that time he was suffering from a rupture. (32, 40)

A very remarkable thing is that he testified that he is a married man and has a wife and two children, (26) but he fails to call any of them to corroborate his testimony with reference to his condition, either before or after the accident. Instead of using those, who would undoubtedly know more about his condition than any other living outside persons, excepting Reid himself, he calls a cook and a helper in the employment office, who knew nothing of the accident or his condition at the time. The testimony offers no excuse of any kind for not calling his wife or family. Certainly, this would seem to be a very substantial element determining the weight of the plaintiff's testimony, in an effort to overturn a settlement by clear and convincing proof.

He appears to have worked at several places since his injury, and probably in the nature of the work,—cook in mines, construction camps and restaurants,—held his job as long as men in his situation usually do. (31, 32, 38) There is an entire failure of proof on the claim of fraud. The only thing he told the doctor was that if there was anything the matter with him he wanted to go to the hospital and get something done. (34) Dr. Longeway testified specifically as to conversation had with Reid, (46-47) and this testimony is absolutely undisputed, except that Reid on rebuttal said that he did not refuse. (79) He does not deny the conversations detailed by Dr. Longeway and Mr. Burton. He detailed the manner in which the accident happened and then said that the stove lid hit his right

foot; that he had a bruise about the shoulder and about the arm; he said that the arm didn't amount to anything.

"I asked him to take off his coat and he said that it didn't amount to anything, his injuries were not bad and he wouldn't take off his coat and let me examine it. He said that would be all right; he was just bruised about the right arm and shoulder. Consequently he didn't take off his coat and I didn't examine his arm. He said it didn't amount to anything and would be all right. I bandaged his foot and told him to stay around two or three days and let me watch him. 'No,' he said, 'It's all right.' He wanted to get right back to work and he left my office and that was the last I ever saw of him." (Tr. 46.)

Instead of the doctor's telling him, as he claimed, that his injuries were slight and that he could go right back to work, the testimony, which is not denied is that

"I asked the man to stay around two or three days where I could take care or look after him, and he said 'No,' his injury didn't amount to anything, and that he wanted to go right back to work." (Tr. 47).

The doctor did tell him that he thought with reference to his injury he would be all right very shortly, although he thought he better stay around there perhaps two or three days to see if this ankle swelled up any more. It was the doctor's belief that he would be all right in a few days. (47) In this he seems to be corroborated by the man's own actions immediately thereafter, in doing the work which he

did do around the cook car. There is no claim and could not possibly be under the evidence, that the doctor was either aware or should have been aware of the hernias, or either of them, or that he deceived or intended to deceive the plaintiff with reference to the effect of the injuries which he had. The only possible claim that could be made is that there may have been a mistake by the doctor in his prophecy as to the duration of his disability. The authorities are unanimous,—including all those cited by the plaintiff,—that equity will not avoid a written contract of settlement for any mistake of prophecy.

Of the six elements of fraud,—all of which are necessary to exist before a release can be avoided,—it would seem that plaintiff has wholly failed to substantiate even half of them. There is no showing that the statement made by the doctor was false; that he knew it was false, or made it recklessly, without any knowledge of its truth or as a positive assertion, or that he made any statement with the intention that it should be acted upon by the plaintiff. Plaintiff claims that he acted in reliance upon the doctor's statement; that it was material, and that he suffered injury thereby, but the preponderance of the evidence is against all of these contentions.

With reference to the execution of the release papers, plaintiff's contention that there was fraud is entirely negatived not only by the great weight and preponderance of the testimony, but by his own acts. He claims in his complaint with reference to this that

he was nauseated, not in full possession of his faculties, was induced to sign a release upon the representation that it was a receipt for the time spent in resting at Great Falls for two or three days,—which upon its face is negatived by his own statement that he went right back to work that same day,—that he did not read and could not read the paper; that the question of settlement was not discussed with him. He claims that these representations were made to him by the physician and claim agent. He does not by his testimony show any statement made by Dr. Longeway with reference to settlement, and the only testimony with reference to settlement talk with Dr. Longeway is Dr. Longeway's own testimony that he had no such conversation and settlement was not discussed with him, and his conversation related solely to the man's injury. After his examination by the doctor he walked along the street, purchased some balsam, had a conversation with Mr. Burton with reference to settlement, which is not denied, in which conversation, at the corner, he told Mr. Burton that he thought he could be fixed up on the payroll with reference to settlement, and was informed that this could not be done; it would have to be taken care of by the claim department; that he went up to the claim agent's office for the express purpose of settling, and he knew it. (Tr. 57, 52).

Reid claims that he cannot remember one thing he signed or anything about the settlement, yet he details the words of a conversation at the time, and says

with reference to the ten dollars that Mr. Foley suggested that himself. (Tr. 79). His account of the transaction in the claim agent's office is as follows:

"Q. State what he said to you?

A. Why, he said it was necessary to send these back to St. Paul. That is what he said to me.

Q. Did he offer you any money?

A. No, said, 'No, you better take ten dollars for to get some liniment' and something like that—'ten dollars to get some liniment to rub on my foot.'

Q. Did he say anything to you about your working or anything?

A. Yes, he did. Said I could just stay around town two days and go back to work whenever I wanted to." (Tr. 29).

He reiterates again that the claim agent told him that this ten dollars was to buy liniment with. (29, 34) That the claim agent dictated the endorsement on the back of the release but that that was in his handwriting. (35) Outside of this testimony he does not dispute in any way the testimony of Mr. Burton and Mr. Foley, as to what actually transpired at the time of the settlement.

An examination of the papers which he signed shows that at the time of the settlement he signed his name seven times. There was an original and duplicate release, which he signed once on the face and once on the back of each one, two vouchers, each of which he signed, and the draft which he endorsed upon the back, all of which papers, except the draft, specifically set forth that ten dollars was

paid in full consideration of all his claims, on account of his personal injuries sustained on the tenth day of May. (35, 54, 60) Upon the back of each release he wrote in his own handwriting:

“I have read within release before signing and fully understand that the sum of ten dollars is in full settlement of all claim of every kind.” (35, 55, 61)

It is immaterial whether he copied this from a slip of paper, or whether it was dictated to him. The fact is that it was brought to his consciousness that he was settling in full for all claims. His version of the payment of the ten dollars that it was for the purpose of buying some liniment is too absurd for credibility, especially in view of the fact that he had already purchased two tubes of balsam for fifty cents.

His letter written October 22nd clearly states:

“And I settled with you ten dollars * * *
I am now well again.” (Tr. 84)

There is no claim whatever in this letter of any rupture having been caused, or having existed by reason of his accident upon May 10th, nor that he suffered anything with reference to his feet, further than he had already stated,—that is a strained or bruised ankle. He had evidently forgotten, when writing that letter, the contents of the release that no promise of future employment was made to him. In any event, there is no attempt made in this action to set aside the release on any claim that a permanent job was promised him.

He went back to work that night, and the testimony of six witnesses,—two of whom are not in the employ of the defendant and have no interest in the litigation,—shows that he did his work the same as he had done it before the accident, and that when he left in July he stated that he was going back to Spokane to see his family. (67-74) No claim was made that he had left on account of any sickness or injuries caused by the accident. In addition to this he stated to Mr. Putnam at Buffalo, a week after the accident, when Putnam asked him with reference to it,—how he felt,—that he felt all right. (78) This is not denied. Upon his return to the boarding car the day of the accident, and at supper, he told the men, apparently in an effort to magnify the settlement, that he had settled for thirty dollars. In view of his seven signatures and endorsements, of his conversations with two witnesses at the time of the settlement, his statement to six witnesses upon the same day, and his letter of October 22nd, can there be any doubt that this man knew that he had settled?

Reid's testimony shows upon its face such contradictions that it cannot be said to be of the clear and convincing nature required to overturn a written instrument, even without any other testimony in the case. For instance, he says he was in good condition prior to the accident (p. 29), and yet even upon direct examination had to admit that he had a rupture before (30). He says he couldn't remember one thing he signed or anything (28) and yet he gives the

details of the conversation between McElroy and the men at the station, (28) the words that the doctor used at the time he examined him, and words used at the time of the settlement. (28, 29) He even emphasizes this on rebuttal by stating that it was Mr. Foley who first suggested the ten dollars, and not himself. (79) Is it reasonable that a man would voluntarily take the train alone from Geyser, go forty miles to Great Falls and be conscious only of the things which he thinks might help him to set aside a release, and unconscious of things which would be detrimental to such an action?

Upon this evidence Judge Rudkin found that Reid's condition at the time of the trial, of a poorly nourished body and general health and physical condition far from good, could not be said to be attributable wholly or even in a considerable part to the accident; that his arteriosclerosis was not produced in any way by the accident; that the condition of the right foot, although it might have been aggravated by the accident, was not caused thereby; that he had had a hernia on the right side for two years before the accident, and that the course of the development of his second hernia after the accident was left in doubt and uncertainty; that the first definite information of a second hernia was eight or nine months later, and that beyond that the testimony throws no light upon his condition or cause thereof, and then he says:

"Good faith, common honesty and the peace of society demand that compromises and settlements of this kind should be upheld unless impeached for fraud or mistake by clear and convincing proof,"

and quotes from Judge Sanborn's opinion in the Wilcox case that such settlements and agreements "will not be lightly disturbed upon confused, conflicting or uncertain evidence of fraud or mistake * * * and a bare preponderance of evidence will not sustain the burden."

Judge Rudkin's statement of the facts shows all the conditions which he himself says will preclude the setting aside of a settlement on the ground of mistake. The facts stated utterly disprove such claims. Upon the facts found by the Court and the application of the legal principles laid down by him to the facts, there can be no other conclusion therefrom than that the plaintiff has wholly failed to make out a case.

The authorities cited by Judge Rudkin sustain this position, which is also supported by the authorities hereinbefore referred to.

There are two cases which were urged in support of the contention that the release should be set aside, but which are in the distinctions which are made in them, authorities for the sustaining of the release in this case.

In *Lumley vs. Wabash Ry.*, 76 Fed. 66, the questions were raised by a demurrer as to the sufficiency

of the bill. It appeared that at the time the examination was made of the plaintiff by the company's surgeon, he complained of pains in the right shoulder, and that the physician disregarded this complaint and made no examination of his shoulder; that the claim agent and the surgeon together advised him he would be able to resume work in eight weeks. The release specifically set out a severely contused and lacerated wound on the forehead on the right side, fracture of right arm between the wrist and elbow, followed by general words relating to various injuries. The shoulder trouble increased, and it was afterwards discovered that it was dislocated and fractured. The sufficiency of the complaint was sustained on the ground that the statement of the physician that the pain in the plaintiff's shoulder was sympathetic, and was caused by the fracture below the elbow, was a positive misrepresentation of the truth and an operative fraud.

There is no such showing in the Reid case. He was told frankly about all he complained of. The physician examined him for all of these troubles, and *Reid* would not let him take off his coat to allow further examination.

A release cannot be avoided because plaintiff discovered subsequently that his injuries were more serious than he thought them to be, even though his opinion may have been based upon that of the releasee's physician.

Chicago & N. W. Ry. v. Wilcox, 116 Fed. 914, 917.

Doty v. C. St. P. & K. C. Ry., 52 N. W. 135.

G. N. v. Fowler, 136 Fed. 121.

The evidence does not connect up the plaintiff's present condition with the accident. There is at the most only confused, conflicting and uncertain evidence that he suffered anything more from the accident than he settled for. There was no clear, unequivocal or convincing evidence of mistake, and if there was ever a case where there is every reason for sustaining the policy of the law and permitting a compromise and settlement of disputed claims, it is this one. We respectfully submit that both Judge Rudkin's findings of fact and the principles of law laid down by him should be sustained, but that his conclusion which is a *non sequitur* should be reversed, and this case remanded with instructions to dismiss the bill.

II.

THE PLAINTIFF BY HIS CONDUCT IS NOW ESTOPPED FROM SEEKING TO SET ASIDE THE SETTLEMENT AND RELEASE.

It appears from the evidence that at the time of his examination and settlement, that he would not let the doctor or anyone take off his clothing and examine him, and would not stay around Great Falls for the purpose of allowing observation of his condition.

Dr. A. F. Longeway testified:

"He also said he had a bruise about the

shoulder and about the arm. I examined his foot and found that it was injured and bruised and the ankle slightly sprained. He was walking on it, walked on it to the office. I asked him about his arm and he said that didn't amount to anything. *I asked him to take off his coat and he said that didn't amount to anything, his injuries were not bad and he wouldn't take off his coat and let me examine it.* He said that he would be all right; he was just bruised about the right arm and shoulder. Consequently he didn't take off his coat and I didn't examine his arm. He said it didn't amount to anything and would be all right. I bandaged his foot and told him to stay around two or three days and let me watch him. 'No,' he said, 'It is all right,'
 * * * He didn't at that time complain to me about any hernia, or any other injury than these that I have testified to. He only complained of the injury to his foot and shoulder.
 * * *

When I examined Mr. Reid I examined his ankle and wanted to examine his shoulder, and he said it didn't amount to anything and wouldn't take off his coat. * * * I advised him to stay around two or three days and let me watch him, and he made the remark about his injury not amounting to anything and he wanted to get back to work. Didn't complain to me about any pains in his abdomen. Didn't tell me that he had had any hernia. Didn't say anything about his abdomen at all." (Tr. pp. 46-48).

He is fully corroborated by W. J. Burton, who testifies:

Dr. Longeway says: "Well, what seems to be the trouble?" He says, "Well, my ankle is hurt, I think." He said, "Well, take off your shoe." * * *

And he asked him if he was injured any place else and he said he had a little bruise on his arm. The doctor says, "Take your coat off and let's look at it." "No," he says, "It isn't very bad, it don't amount to anything." I says to him, "Let me look at it." He says, "No, no," and he refused to take his coat off and then I spoke up and said, "Have you any other injury?" and he said, "No, just shook up a little," he says, "I was knocked down in the car." I says, "Well, you are sure you haven't any other injuries?" He says, "No, none at all only that ankle," and he says, "that pains because my feet have been crippled for a long time," he says, "and it hurts me." * * * The doctor asked him to stay around a day or two until the swelling went down and he said, "No, it isn't necessary; it don't amount to anything," and he wouldn't stav * * * I asked him to let the doctor see his arm and shoulder, and he refused to do it. He said there wasn't anything the matter, only his ankle and said it was all right. (Tr. pp. 51, 52, 57).

All that Reid has to say about this is as follows:

"The doctor examined me in his office. I didn't refuse to let them,—I did not refuse nothing." (Tr. 79).

He does not deny the conversations detailed by Dr. Longeway and Mr. Burton, and they stand undisputed. He does not deny that he was asked to take off his coat, or to allow the doctor or Mr. Burton to look at his arm or shoulder; he does not deny that he was asked if he had any other injuries, and that he replied, "No, just shook up a little: I was knocked down in the car"; does not deny that in re-

sponse to the question: "Well, are you sure you haven't any other injuries", he said "no, none at all only that ankle." He doesn't deny that the doctor asked him to stay around a day or two and let the doctor watch him, and that he stated his injuries didn't amount to anything, and that he wouldn't stay around; he doesn't deny that at that time he made no statement whatever about the hernia he previously had, or any other hernia.

Where a party by his conduct waives inquiry into a fact, he cannot subsequently be heard to say that either he or the releasee were ignorant of such fact in an attempt to set aside the release.

Kowalke vs. Milwaukee Ry. Co., 79 N. W. 762.
G. N. vs. Fowler, 136 Fed. 123.

The Kowalke case is well considered, and a very instructive decision upon the question of mistake. Plaintiff's husband claimed his wife suffered an injury in an accident, and that she was pregnant at the time. Examination to ascertain the fact was proposed by defendant's surgeon, which she refused, stating that she was sure from certain symptoms that nothing of the sort existed. The doctors, from questions propounded to her, were not sure that she was. A general release was signed. She afterwards suffered a miscarriage. Suit was brought, and in a trial by the court on all the questions, except damage, a finding was made that mutual mistake was made in good faith by both her own and the defendant's physicians, without fraud or misrepresentation.

A judgment for the plaintiff was reversed. In discussing what is meant by "a mistake of fact" the court said, with reference to the difficulty of framing an accurate definition of this phrase:

"This is not surprising, in view of the fact that the whole doctrine is an invasion or restriction upon that most fundamental rule of the law that contracts which parties see fit to make shall be enforced, and in view of the further consideration that one or both of the parties is often, if not usually, ignorant or forgetful of some facts, thoughtfulness of which might vary his conduct. The most philosophical definition we have found is that presented by *Pom. Eq. Jur.*, Sec. 839: 'An unconscious ignorance or forgetfulness of the existence or non-existence of a fact, past or present, material to the contract.' This definition contains several elements, each of which, as above suggested, must be explained and qualified in its practical application. Thus, the ignorance must be unconscious; that is, not a mental state of conscious want of knowledge whether a fact which may or may not exist does so. *Kerr, Fraud & M.*, p. 432. This idea is involved in, and furnishes a reason for, the exception pointed out by Dixon, C. J., in *Hurd vs. Hall*, 12 Wis. 112, 127, on authority of *Kelly vs. Solari*, 9 Mees. & W. 54, viz.: Where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake, in the legal sense. These limitations are predicated upon common experience, that, if people contract under such circumstances, they usually intend to abide the resolution either way of the known uncertainty, and have insisted on and received consideration for taking that chance. Akin to the rule that the ignorance must be unconscious,

though going still further as an exception, is the other rule, that ignorance must not be due to negligence, although there be no actual suspicion with reference to the fact in question. *Pom. Eq. Jur.*, Sec. 856; Kerr, *Fraud & M.*, p. 406; *Hurd vs. Hall*, 12 Wis. 126; *Conner vs. Welch*, 51 Wis. 431, 8 N. W. 260 * * *

Passing the requirement that the fact as to which mistake is made must be either past or present,—for it is obvious that the coming into existence of any future fact must at the time of contracting have been understood to rest in conjecture, and the contingency thereof to have been assumed by both parties,—another essential element of the definition is that the fact involved in the mistake must have been as to a material part of the contract, or, as better expressed by Beach, *Mod. Eq. Prac.*, Sec. 352, an intrinsic fact; that is, not merely material in the sense that it might have had weight if known, but that its existence or nonexistence was intrinsic to the transaction,—one of the things actually contracted about. As, in the familiar illustration of the sale of a horse, the existence of the horse is an intrinsic fact. Another partial expression of this requisite, adopted by *Pom. Eq. Jur.*, Sec. 856, is as follows: ‘If a mistake is made as to some fact which, though connected with the transaction, is incidental merely, and not a part of the very subject-matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for relief, affirmative or defensive.’ The last part of this statement is adopted in *Klauber vs. Wright*, 52 Wis. 303, 308, 8 N. W. 893; *Grymes vs. Sanders*, 93 U. S. 55, 60. * * *

A further limitation upon the maxim, ‘*Ignorantia facti excusat*,’ especially applicable to cases like the present, is that where parties have entered into contract based upon uncertain or con-

tingent events, purposely, as a compromise of doubtful claims arising from them, in absence of any bad faith, no rescision can be had, though the facts turn out very differently from the expectation of either or both of the parties. In such classes of agreements the parties are presumed to calculate the chances, receive compensation therefor, and assume the risks. *Pom. Eq. Jur.*, Sec. 855; *Beach, Mod. Eq. Prac.*, Sec. 43, 56; *Bank vs. McGeoch*, 92 Wis. 286, 313, 66 N. W. 606. It is too obvious to require more than statement that, if parties fairly agree to abide uncertainty as to past or as to future events, they must do so. *Kercheval vs. Doty*, 31 Wis. 476."

Kowalke vs. Milwaukee Ry., 79 N. W. 764.

The testimony shows that even though Reid may have been ignorant of his condition, he certainly by his objection to a detailed examination, waived all inquiry into his condition. It must be conceded that he settled for his hurt on his foot, his being shaken up completely, and his nerves and nervous shock, for his feeling of weakness and pain, all of which he testified to as having been felt at the time he went to the doctor's office. He himself says that he was told to stay around a couple of days, and does not deny that the doctor told him to stay around two or three days and let him watch him. It is his claim that the next day he discovered something down there, where it hurt. This was a condition, which if he had not waived it, would have been discovered before the settlement, but by his conduct he waived it, and precluded all inquiry into it. He was being paid at the rate of two dollars a day, was away from his work

between breakfast and dinner of one day and received in consideration therefor ten dollars, keeping continuously at work from May 10th until July 2nd. Under these circumstances it is certainly evident that he intended to abide the resolution of the known uncertainty, and insisted upon and received consideration for taking that chance. If he suffered any further injuries than were apparent, the ignorance of these injuries was due to his negligence in failing to allow the examination, although he might not have had any suspicion with reference to the fact. Any mistake which might have been made was as to the coming into existence of the future fact, and this resting in conjecture, the contingency thereof was assumed by both the plaintiff and the defendant. Certainly, his conduct, both active and negligent, was such as indicated an intention to waive all inquiry into it, and the settlement was not made when he was in mistake. This is particularly true also by reason of the fact that the basis of an attempt to set aside this release is the second hernia. The only testimony with reference to this in the record is that of Dr. Marshall, in which he says that the lifting necessary for him to do would be more likely to cause the hernia which developed than any blow; that the fact of having the right inguinal hernia before showed that he had a tendency to it, as there is a tendency for hernia to be bi-lateral, and they are usually so. (Tr. 65, 66). With the development of the left hernia attributable to the right hernia, had prior to the accident, and the fact that hernias are usually bi-lateral,

that is, one on each side, the attempt to set aside the release on the ground of mistake as to this hernia is based upon confused, conflicting and uncertain evidence, which is not clear, unequivocal or convincing. Under Judge Rudkin's statement of the law, the opinion of Judge Sanborn in the Wilcox case, and all of the authorities, this should not be done. Furthermore, it is apparent that by his conduct he intended to waive all inquiry into the fact or investigation to show it, and he ought not now be allowed to offset good faith, common honesty and peace of society in an attempt to overturn his contract agreement.

III.

THE RELEASE WHICH WAS "FOR HIS PERSONAL INJURIES" AND "ALL CLAIMS,"—HE HAVING UTTERLY FAILED TO SHOW ANY FRAUD OR MISREPRESENTATION,—WAS CONCLUSIVE AND BINDING.

The release "released, acquitted and discharged the railway company from any and all liability, causes of action, costs, charges, claims or demands of every name and nature, in any manner arising or growing out of, or to arise or *grow out of personal injuries received* by me at or near Geyser in the State of Montana, on or about the 10th day of May, 1915, while acting as a cook I met with an accident whereby I sustained personal injuries."

This was executed twice and signed by Reid. Furthermore, he endorsed upon the back of that release, in his own handwriting, and under his own signature: "I have read within release before sign-

ing and *fully understand that the sum of ten dollars is in full settlement of all claim of every kind.*"

In addition to this he executed an original and duplicate voucher, signed by himself, reciting "for and in consideration of any and all claims, past, present and prospective against the Great Northern Railway Company arising or to grow out of personal injuries received by me at or near Geyser, Montana, on or about May 10th, 1915, ten dollars." He also endorsed a draft, "Pay to the order of W. J. Reid ten and no-100 dollars for personal injuries received near Geyser, Montana, May 10th, 1915, as per release and receipted voucher for like amount attached hereto."

This constitutes seven distinctive executions by Reid of statements that he had made settlement in full for all personal injuries and all claims arising out of the accident at Geyser. There was no recital of any direct personal injuries, nor was the settlement limited to any special bruise or portion of his anatomy. This release being in general terms, covering all injuries, no evidence should have been allowed to be introduced, nor retained in the record, which was intended to show that there was not included in the release all the injuries claimed, either disclosed or undisclosed. The question was saved by objection to the introduction of such evidence, and by motion to strike the evidence, after it had been received subject to objection, at the conclusion of the trial.

(Tr. 26, 43, 62, 79; Assignment of Error 1, 2, 3, 5, 7).

A release of all damages of claims, without specifically mentioning the particular injuries, is not open to construction as to particular injuries to be included; and all injuries, developed or undeveloped, are considered to have been in the contemplation of the parties and embraces within the terms of the release.

Houston & T. C. R. Co. vs. McCarty, 53 L. R. A. 507; 60 S. W. 429.

Lumley vs. Wabash Ry., 76 Fed. 66.

In the Lumley case the Court referred to the fact that the specific words describing the injuries in the release operated as a release covering specific injuries only, and that the general words following relating to various injuries specifically enumerated. The court said:

“But if this surgeon honestly supposed the shoulder pain to be sympathetic, either because his examination had been superficial, or because he had made none, we would then have a case where a release is comprehensive enough to cover a matter or claim unknown to both parties, and was therefore not the subject of consideration. Equity relieves from mistakes as well as frauds. The case is not one where it was sought to compromise and settle a general claim for all the injuries resulting from a particular accident, known and unknown. If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered, or enumerated. The subsequent discovery by one giving

such release that he was worse hurt than he had supposed, would not, in and of itself, be ground for setting aside the settlement or limiting the release. We put our judgment upon the facts stated in this bill, to-wit, that both parties supposed complainant had received certain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties of a character so serious as to clearly indicate that, if it had been known, the release would not have been signed."

In this decision, which was subsequently quoted with approval by this court in the case of *G. N. vs. Fowler*, 136 Fed. 118, the exception was reserved: "If one agrees that he will receive a given amount in satisfaction and settlement of his damages, sustained through a particular accident, it is not essential that every possible consequence or tort shall be mentioned, considered or enumerated. Subsequent discovery by one giving such a release that he was worse hurt than he had supposed would not in and of itself be ground for setting aside the settlement or limiting the release," and the court impliedly holds that where there are particular words reciting particular injuries, a release should cover such particular injuries only, but where there are general words reciting general damages, and which

are in and of themselves sufficient to cover all injuries, that the release should be sustained as to such injuries.

Lumley vs. Wabash, 76 Fed. 66, 71.

G. N. vs. Fowler, 136 Fed. 118, 122.

This is specifically decided in the case of *Houston & T. C. R. Co. vs. McCarty*, 53 L. R. A. 507, in which the language of the release was almost identical with that shown by the evidence in the Reid case, and in which reference is made to the decision in the Lumley case. The court says:

“This case is also clearly to be distinguished from the *Lumley Case* and the other cases on that line. In those cases the contract was neither set aside nor impaired by reason of any mistake of the parties to the release. There, by a rule of construction, the operation of the release is restricted to the particulars mentioned. Here, no particular injuries are mentioned. The release is of all damages which have accrued or may accrue to the plaintiff by reason of the accident in which he was injured. Here then, the terms of the release are not to be mistaken, and the contract is not open to construction. In the face of such an instrument, it cannot be said that all the injuries which might be developed as a result of the accident, whether known or unknown, were not in the contemplation of the parties to the instrument, and were not embraced within its terms. In all such cases the damages are ascertainable in a legal sense, but in fact are uncertain in amount. Until the extent of the injuries has been clearly developed, they may be more or less than appearance would indicate, and therefore, in every settlement of the character of that under con-

sideration the parties take the chances of future development,—the one of paying more than an adequate compensation for the wrong inflicted, and the other of receiving less.

Our conclusion is that the release embraces all damages resulting from the injuries of the plaintiff, and that it cannot be varied by parol evidence tending to show that other injuries than that to the ankle were not in the contemplation of the parties."

Houston & T. C. R. Co. vs. McCarty, 53 L. R. A. 507; 60 S. W. 421.

CONCLUSION

The trial court specifically found that there was no fraud or misrepresentation in any respects claimed in the complaint. He further specifically found that as to any claim of mistake the plaintiff's general condition could not be said to be attributable wholly or in part to the accident; that this involved three claims: arteriosclerosis, double flat foot and hernias; that neither the arteriosclerosis or double flat foot were consequent upon the injury, and that the development of hernias was left in doubt and uncertainty. All of the elements, in fact and law, why this settlement should not be overturned and why it should be sustained are contained in the finding of the trial court, and constitute a foundation for a correct conclusion which should have been arrived at from these elements. We ask this court to place the proper superstructure upon this foundation, and reverse the conclusions of the trial court.

There was no mistake, such as equity relieves against, shown as to injuries not included in the settlement, for there was no showing that any injuries have developed which were not included. There is no evidence that the second hernia was the result of the accident. Its first appearance is recorded on February 26th, 1916, nine months after the accident. Furthermore, under the *Kowalke* and other decisions, cited with approval in the *Fowler* case, there cannot be any doubt that the conduct of the plaintiff at the time of the examination was such that he waived by his statements with reference to his injuries and further examination, all inquiry into, or investigation relating to, other injuries, and that neither he nor the defendant were in mistake, such as is contemplated by the courts of equity.

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No. 2896

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a Corporation,

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Brief for Appellee

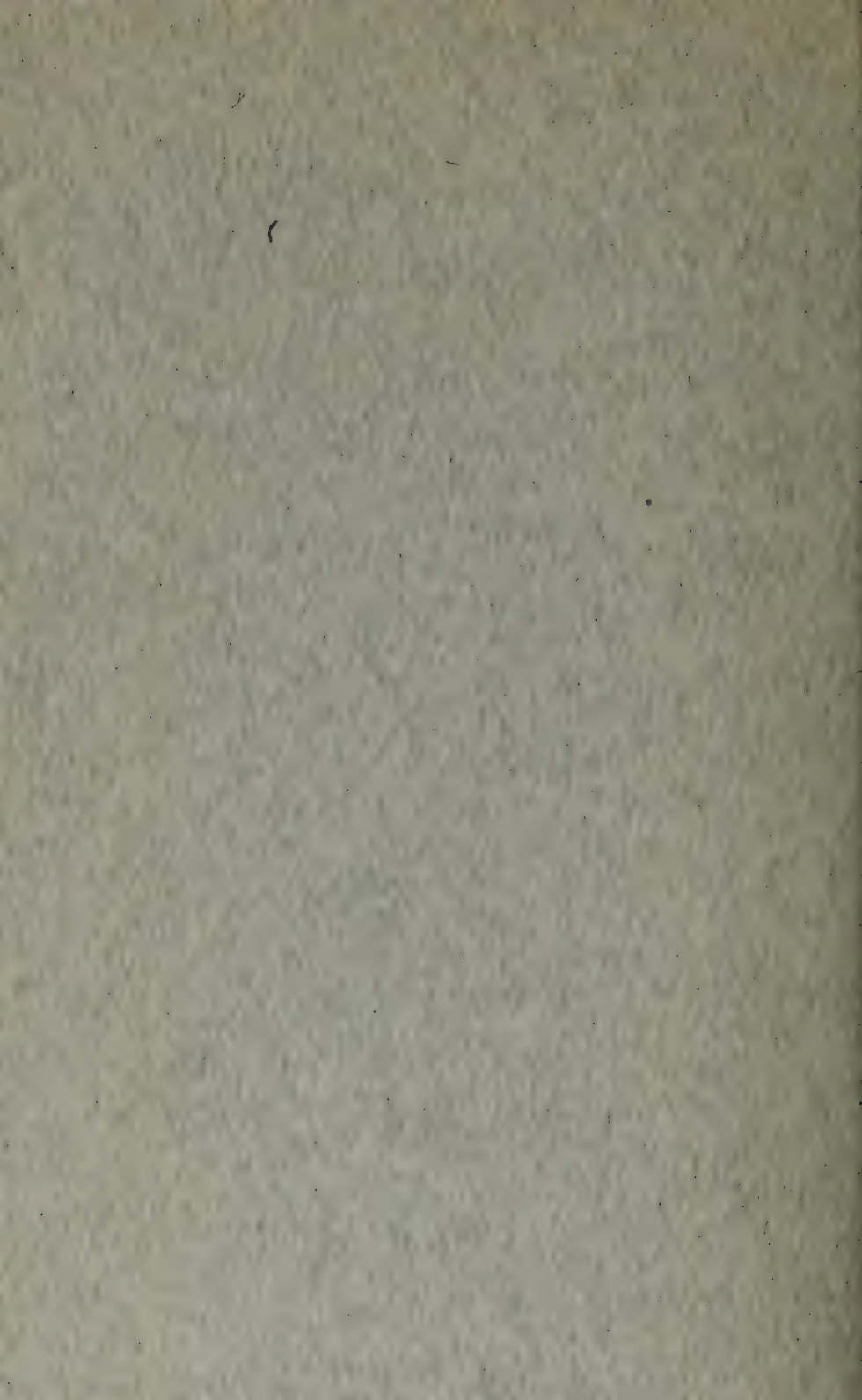
Upon Writ of Error to the United States District Court for the
Eastern District of Washington, Northern Division.

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Brief for Appellee

Appellant's assignments of errors are nine in number, several of which are similar in substance and effect. How many of them are urged it is difficult to say; but from its counsel's assembling of the propositions now before the court (Brief of Appellant, page 18), they appear to be whether the appellee received in the accident injuries not disclosed in the settlement, or known to them; whether appellee is by his conduct estopped from claiming the right to recover for such newly discovered injuries, and did the release executed in the manner and terms appearing constitute a bar to any action for injuries received in that accident. These, appellant says, are the three questions for determination.

We think that the real question before this court is whether there was such a mistake in the settlement, as evidenced by that release, that a court of equity will afford relief to a party against whose claim it is interposed. The circuit court found and held that such a mistake inhered in the transaction. It found and decided against appellee's contention that it should be annulled for fraud and based the decision and decree solely on the ground that a mutual mistake of fact had been made, so that, therefore, while no fraud was established as to the procuring of the release, it would under the facts and circumstances amount to the perpetration of a fraud on appellee if the appellant were to be allowed to interpose it in bar of the action at law.

Counsel for appellant begin with the assertion that no injury was sustained by the appellee in that accident, which was not known to him and not in contemplation of the persons having a hand in making the settlement. This is the head-liner for subdivision I of appellant's argument. This question, we think, was not and could not be finally determined in the action to avoid the release or limit its operation. The remarks of Judge Rudkin as to the cause or origin of the physical ailments of which the appellee complained were not meant to dispose of that issue, for the court said that, regardless of any such uncertainty, if appellee has sustained injuries not embraced in the compromise set forth in the complaint, he should have his day in court and an opportunity to

establish his rights before a jury.

For the purposes of the case at bar all the appellee was required to establish in that regard was an uncertainty. He made out a *prima facie* case, when he proved facts sufficient to present a jury question as to the determination whether his conceded existing condition was caused by the accident.

Appellee had no hernia on the left side before the accident. He did not feel any trouble there during the negotiations with the claim agents, and it was the next day that he became aware of something, he didn't know what it was, down there where it hurt. (Tr. 29). He complained to the company of the double hernia in June, the month following that in which the accident occurred.

Stripped of all its engaging exposition of esoteric learning, expressed in the nomenclature of *materia medica* and anatomy, the testimony of Dr. Marshall, appellant's expert, leaves the matter finally punctuated with a prominent interrogation point. The examination of Dr. Marshall concluded:

"Q. And you cannot tell what the cause of the hernia?

A. I know what the predisposing cause is.

Q. But you cannot tell whether or not it is caused by a severe strain or by lifting or pushing, can you?

A. No, in an individual case I cannot tell what the precipitating cause was.

Q. And isn't it possible, say a man was thrown violently across a car so he could bruise

and strain himself, wouldn't that cause this hernia to happen?

A. If thrown violently?

Q. If thrown violently.

A. If thrown violently." (Tr. 67.)

From the testimony of Reid, the appellee here, it cannot be gathered that he was gently wafted across the cook car to comfortable repose against the sink, and we think that the evidence of violence was sufficient for its consideration in the case at bar. (Tr. 27.) So here we have it concededly established that the appellee is afflicted and suffering from a double hernia, where before he had but a single one. It matters not that the hernia on his right side which he had before the accident was what Dr. Marshall characterized as the "predisposing" cause of that on the left, if the accident was the precipitating cause. In any event, the ultimate fact must be submitted to and determined by a jury, and not by the *ipse dixit* of a doctor in this sort of a case where the injury figures only incidentally.

The answer to the first inquiry of the appellant on page 18 of its brief must be answered in the affirmative. We do not think that the fact of the injury needs to be established by the degree of proof indicated. That the hernia on the left side was not disclosed is absolutely certain. No such thing was ever discussed or mentioned. It was neither known to the appellant nor the appellee. Nothing was considered in the settlement outside of the swelled ankle.

Dr. Longeway, the appellant's resident physician, does not pretend that he was treating or considering any injury other than that to the foot, except for his claimed insistence on examining Reid's shoulder. He says:

"I asked the man to stay around two or three days where I could take care of and look after him. * * * I told him I thought he would be all right. That was my opinion that he would be all right very shortly, although I thought he better stay around there perhaps two or three days to *see if his ankle swelled up any more.*" (Tr. 47.)

The claim agent, Burton, testified:

" * * * And the doctor looked at his ankle and twisted it around and said, it is slightly swollen and he examined it very carefully and wiggled it all around. * * * The doctor asked him to stay around a day or two until the swelling went down and he said, 'No, it isn't necessary; it don't amount to anything,' and he wouldn't stay." (Tr. 51-52.)

According to the claim agent, Foley, the sprained ankle was all that he dealt with in concluding the settlement. When he says that Burton brought Reid from Dr. Longeway's office:

"I asked him, 'Did the doctor look you over?' He said, 'Yes, sir.' I said, 'What did he tell you?' 'He said my ankle was sprained a little.' * * * " (Tr. 59.)

Appellee testified that the claim agent said:

" 'You better take ten dollars for to get some

liniment,' and something like that, 'ten dollars to get some liniment to rub on my feet.'" (Tr. 29.)

While each of the claim agents deny the talk about liniment for feet, they are at variance with each other in their versions. Burton says that Foley asked him if he thought ten dollars would be all right, and that Reid said that would be fine. (Tr. 54.) Foley says he asked Reid how much he wanted in the line of settlement, and that Reid said, "Well, how will ten dollars do?" (Tr. 60.) Foley says Burton was wrong in his account of what occurred as to the mention of money. (Tr. 61.) Since the claim agents fell out with each other as to what occurred, it appears that the recital of Reid as to the talk about liniment for feet ought to be regarded as entitled to credence.

As to what Dr. Longeway considered in his part of the settlement transaction, the appellee testified that he was met at the depot in Great Falls by two men who took him to the doctor's office in an automobile; that the doctor examined him, told him he was badly shaken up, and said, "You will be all right to work tomorrow, if necessary." The doctor just examined his foot; that was all. (Tr. 28.)

APPELLEE'S AUTHORITIES.

We will leave for the present the discussion of appellant's second interrogatory at page 18 of the brief until later, and dispose of the third query propounded at page 19, which is whether a release executed in the manner and form as that herein consti-

tutes, by its terms, a bar to any action on account of personal injuries. In answering that question, which is determinative on this appeal this appellee relies for sustaining the judgment and decree herein upon three cases. These are:

Lumley v. Wabash R. Co., 76 Fed. 66;
G. N. Ry. v. Fowler, 136 Fed. 118;
Tatman v. Fidelity B. & W. R. Co. (Md.),
 85 Atl. 716.

In the Tatman case the authorities upon the question at issue are thoroughly reviewed, and in that case a release as general in its terms and as comprehensive in its scope as the one in the case at bar, was involved, and the Railway Company was restrained from pleading the release in the law action wherein the plaintiff was seeking to recover damages on account of injuries sustained while a passenger by the explosion of powder in transportation over the company's railroad. The plaintiff at the time of her injury was a minor, named Blema B. Jones. She subsequently was married, and as plaintiff, sued as Blema B. Tatman. Her mother also was injured by the same explosion. A joint release was executed by Blema B. Jones, her father and mother and the guardian appointed for the child; the sum of \$3400 was paid for the release for injuries to Blema B. Jones and her mother without stating in the release the character of the injuries or distributing or separating among those entitled thereto the sum paid for the injuries to the two persons. It was agreed,

however, that the sum of \$500 was for injuries to Blema B. Jones, and this part of the \$3400 was received by her guardian. Beyond slight injuries, the injury received by Blema B. Jones was to one of her eyes. She was attended by the physician usually employed by the family and by another physician, an eye specialist of repute, both of whom were employed by the Railroad Company, and by it paid for their services. These physicians told the injured girl, her parents and one Dorrance, an agent of the company engaged in settling claims of those injured by the explosion, that the injury to the girl's eye was only a scratch on the surface of the eye, and one of them said that glasses would bring the eye right. Relying on these representations, the parents of Blema B. Jones agreed with Dorrance upon a settlement for the injuries sustained by the child and her mother. The release was in the following language:

"All claims and demands which we or any of us have or can have, against the said the Philadelphia, Baltimore & Washington Railroad Company, or their successors, for or by reason of any matter, cause, or thing whatsoever, and more especially by reason of losses and damages sustained by us in consequence of personal injuries received by the said Addie M. Jones, wife of the said Alexander Jones, and injuries received by the said Blema B. Jones, minor daughter of the said Alexander Jones and Addie M. Jones, which were caused by the explosion of glycerine powder in a car of a train at Greenwood, in the state of Delaware, on December 2, 1903. And the said the Philadelphia, Baltimore & Washington Railroad Company, in paying the said sum of

money, do so in compromise of the said claim and demand above released, not admitting any liability on account of the same."

Afterwards the injury to the eye of Blema B. Jones was found to be different from that which all concerned considered to exist at the time of the release. She lost the sight of the injured eye, and another specialist found that the eye, instead of being superficially scratched, had been penetrated deeply through four coats, including the retina, and the eye was removed. The court said:

"By the pleadings and proofs, then, it appears that a release was given for personal injuries, all the parties to the release, both releasors and releasee, believing that the injuries were of a certain kind, while in fact they were not only more serious in extent, but different in kind, for it is fair to say that a superficial scratch of the cornea of the eye is quite a different kind of an injury from a deep penetration through four coats of the eye, including the retina. Again it appears clearly proven that all parties relied on the physicians of the company and their representations without independent advice, and that the statements were made and treated as the basis of the settlement which was induced thereby. It is also true that there is no evidence of bad faith on the part of the medical attendants, but of a mistake in diagnosis. Under such circumstances no fault is attributable to the complainant, or those acting for her, in accepting the settlement and giving the release, under the circumstances here alluded to, or under any shown in the evidence."

In its review of the cases the Maryland court cites all of the cases comprised in the endless chain of au-

thorities presented by appellant and many others, which it distinguishes, and bases its decision upon the *Fowler* and *Lumley* cases. We set out the Maryland court's treatment of those cases fully for the reason that we feel it could not be done better than in that opinion:

"A case in point is that of *Great Northern Ry. Co. v. Fowler*, supra. There the complainant, a brakeman on the railroad, after being injured went with a claim agent of the company to the physician of the company, who found a scalp wound and a contusion of the shoulder and nothing more, but told the injured man that he was practically well and would be able to go to work in a week or two. Without other advice the complainant settled for an amount equal to wages he would lose, and bills for doctors and nurses. A release was given, which apparently was general in form, without specifying the injuries. Later it developed that the injuries were serious, the disability permanent and a dangerous surgical operation was performed. The Circuit Court of Appeals affirmed the decision of the Circuit Court annulling the settlement and release. The appellate court found that there was a mutual mistake as to the nature and extent of the injuries and that the settlement was induced by the advice of the surgeon of the releasee without other advice, and, therefore, that the release should be set aside. The court distinguished the case before it from one where there was no misrepresentation on the part of the releasee and the releasor simply relied on the opinion expressed by the physician of the releasee employed to examine and report on the injuries. Such a case was *Nelson v. Minneapolis, etc., Co.*, 61 Minn. 168, 63 N. W. 486. Judge Gilbert thus distinguished:

‘But it is equally true that a mutual mistake of fact or an innocent misrepresentation of the facts of the releasor’s injury, made by the releasee’s physician, may be effective to avoid a release induced thereby.’”

“In the case of *Lumley v. Wabash R. Co.*, 76 Fed. 66, 70; 22 C. C. A. 60, 64, the injured person was examined by the physician of the company which had caused the injury. It was supposed that the only injury was a broken arm, and when complaints were made of shoulder pains no examination of that part was made by the surgeon, who told the injured man that it was due to the broken arm and they were sympathetic pains. Based on these facts a release was given. Later a broken shoulder was discovered. The release was set aside. Judge Lurton in giving the opinion, said there were two grounds of relief, and thus stated the first:

‘If the existence of this injury was known or suspected by the surgeon of the defendant, it was his duty, under the facts stated in this bill, to have informed Lumley of the trouble. To say to him that the pain of which he complained was sympathetic, and was caused by the fracture below his elbow, was a positive misrepresentation of the truth, and an operative fraud. To say that Lumley ought not to have trusted or relied upon his opinions or representations, knowing that he was in the service of the company, against whom he had a claim, is no answer. On the facts stated he knew that a release was being bargained for upon the basis of his opinion as to the extent and character of the injuries complainant had received, and the probable time he would lose from his occupation by reason thereof. He was under strong obligation to give his honest opinion upon a matter of professional knowledge, upon which he had every reason to know this ignorant man was implicitly relying.’”

Of the case of *Houston & Texas R. R. Co. v. McCarty*, 60 S. W., 429 (53 L. R. A., 507), cited by appellant, and which is also cited by this court in the Fowler case, the court said of that case as decided in the court of Civic Appeals of Texas, and which is there entitled, *McCarthy v. Houston, etc. R. R. Co.* 54 S. W., 421, that it:

“was a case where a passenger was injured, and while ill was advised by the physician and claim agent of the company. The only injuries seemed to be a broken ankle. The physician’s attention was called to severe pains in the back and bowels of the injured person, but the physician told the injured man that they would be well in six weeks. Relying on this statement, the release, general in form, was for all injuries from the accident without stating any particulars as to what the injuries were. Soon serious trouble with the spine and bowels of the releasor developed. It was sought to annul the release as a bar to an action for damages. The Court of Civil Appeals held that, notwithstanding the form of the release, the misrepresentation of the physician of the company was sufficient to upset the settlement. On appeal the decision was reversed by the Supreme Court, because of the form of the release (see 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854.)”

The Maryland court said that it was significant that the reliance of the releasor on the statement of the physician of the company was not certified to the Supreme Court in the Statement of Facts, and so was not considered by that appellate court; that the decision of the court of Civil Appeals of Texas

was, therefore, entitled to be regarded as of more weight than that of the Supreme Court.

It will be observed that in the *Tatman* case the pleading of the release was enjoined on two grounds. The first was the fact that the injured persons relied on the statement of the physician of the Railroad Company, and the second was mutual mistake. Of the first the court said:

“In the case before this court there was an entire reliance on the physicians of the railroad company in the negotiations for the settlement, and but for their statements as to the extent of the injury it is but fair to say that the settlement would not have been made. These statements as to the wound were untrue. An innocent misrepresentation made by the physician of the releasee, as to the kind of injury received by the releasor may be effective to avoid a release induced thereby.”

And as to the second ground it said:

“Notwithstanding the general terms of the release, the case before this court is not one where it was sought to compromise and settle a general claim for all injuries resulting from a particular accident, known and unknown, but only those known to exist, as reported by the defendant's physician, on whose reports all parties to the negotiations and release rightly relied. If the physicians honestly supposed that the eye was only scratched on the surface, and not penetrated deeply to the retina, either because their examinations had been superficial, or for other reasons, then the case is one where the release is comprehensive enough to cover a matter of claim unknown to both releasor and releasee, and, therefore, not considered in the settlement. From

such mistake, according to settled principles applicable to all mistakes of fact, instead of opinion, equity will relieve.

"On both grounds, either of which is sufficient, the court should relieve the complainant from the consequences of the release.

"It is undisputed in this case that the releasor and releasee depended on the statements of the physicians of the releasee as to the kind and extent of the injury; that the settlement was induced by these statements, made for that purpose; and that the statements were wrong. Under such circumstances, by all the cases which have been brought to the attention of, or examined by, this court, there exists such a clear mutual mistake as to existing facts, and not as to opinions, as should invalidate the release as a binding settlement, though the release be in form for all injuries received from the accident without specifying the injuries."

APPELLANT'S CLAIM OF ESTOPPEL.

Subdivision II of appellant's brief is devoted to its claim that by his conduct appellee is precluded from now making a claim for any other injury received by him in the accident. Appellant says that where a party by his conduct waives inquiry into a fact he cannot subsequently be heard to say that either he or the releasee were ignorant of such fact, in an attempt to set aside the release. No doubt the position of appellant as to the abstract proposition of law is correct, but the trouble is, no such case as fits it is presented here.

Appellant makes much of the alleged attempts on the part of Dr. Longeway and claim agent Burton

to induce the appellee to remove his coat to have his arm examined. Their statements of what occurred at that examination in the particular of the removal of the coat were mere conclusions. Each says Reid either would not take off his coat or refused to take it off, saying the injury to his arm or bruise on his arm and shoulder did not amount to anything, and he would be all right. The physician and claim agent seek by their testimony to make it appear that the appellee was a very hard customer to deal with; that they were greatly concerned in his welfare, and were endeavoring to find out everything that possibly could form the basis of a claim for injuries on the part of appellee.

This is the only incident, it seems, in the trial record where Reid appears to be disposed to make objections to anything. On page 51 of the record, Burton, the claim agent, says:

“His general appearance seemed to be all right. He was very sociable, talked very freely, explained the accident, gave me the time and just what he was doing and talked a great deal all the way from the office to the doctor’s office, and he also talked at the time the doctor was taking care of his foot.”

Nowhere do we find Reid objecting to anything that was suggested to him until his refusal to take off his coat. Appellant now contends that this refusal to take off his coat was a waiver of any claim of injury which he might have suffered in the accident. How the doctor could discover that Reid had

suffered an injury which would result in hernia by taking off his coat, we are not advised by appellant. We think the court will take judicial notice of the fact that no such hernia as is claimed the appellee suffered in that accident could be discovered by the removal of the coat, vest and shirt. That would not amount to a waiver of a claim for that hernia any more than if the appellee had been requested to remove his hat and had refused to do so.

The case of *Kawalke v. Milwaukee Ry. Co.*, 79 N. W., 762, cited by appellant in this connection, and which counsel say is well considered, is not at all in point. In that case the very nature of the situation out of which the subsequent claim of injury arose was the subject of discussion. The plaintiff in that case claimed and insisted that she was not in the condition which the examining physician thought she was, and to ascertain which he insisted upon making an examination. She was equally certain that no such condition existed, and was so much so that she refused to have the examination performed. She certainly knew or ought to have known as much about as the doctor.

In the case at bar nothing about hernia was suggested or thought of by any of the parties concerned in the settlement. As to any injury which might have developed in Reid's arm or shoulder, or anywhere concealed by his coat after he had refused to remove it, and submit to an examination, it might well be said that he ought to be precluded from

making any claim for damages on such account on the principle of estoppel by waiver. It is certainly a fixed principle of law that one cannot be held to waive anything about which he knows nothing and concerning which there is neither claim nor dispute.

CONCLUSION.

A perusal of the entire record of the case as presented by appellant renders it apparent that the appellant was by its witnesses seeking to establish that appellee made his trip to Great Falls for the purpose of collecting damages for his injury. We have the testimony of Burton that the first time he ever saw Reid was when Reid came into the claim agents' office. (Tr. 49.) Burton says that he went down to the station in response to word from Geyser that a workman had been injured, and would be on train No. 237 which was due at Great Falls at 1:30. He said he looked around the station and could not find Reid, and went back to the claim agents' office. (Tr. 49.)

Appellee's witness, McElroy, who had known Reid prior to the accident, was at the station in Great Falls at the time of Reid's arrival. He says:

"Why, I started to go up to speak to Mr. Reid and the old gentleman stepped between us. I wanted to ask him what the trouble was because I saw he was hurt, looked bad and his shoe was cut up there and he seemed in pain. I knew he had only been there somewhere about thirty days or a month and I recognized him and I wanted to see what the trouble was and

the gentleman objected to my talking to him. He asked me who I was and I told him who I was. 'Oh,' he says, 'That is different,' he says, 'You can talk with him, but I thought you were a lawyer trying to get a case.' I says, 'No, I am not a lawyer.' " (Tr. 41.)

The old gentleman referred to by Mr. McElroy was none other than the claim agent. That claim agent was Burton, who took Reid to the doctor's and to his office. (Tr. 28.)

Appellant's counsel, at page 27 of the brief, say that Reid's claim that he was taken from the station to the doctor's office in an automobile is not substantiated even by McElroy. It is true that McElroy does not testify as to the automobile, but we submit that all of the probabilities are naturally resolved in favor of Reid's testimony. Certainly if the claim agent was there at the station for the purpose of taking an injured employee to the company's physician, it is most likely that he would be there with a conveyance of some sort.

Referring also to Reid's condition, appellant's counsel say, at page 27 of the brief, that he walked down the stairs from the claim agent's office a block and a half to Dr. Longeway's office, and up the stairs, then back down over to the depot and took the train back to Geyser the same day, the record nowhere bears out such statement. The fact is that Reid was endeavoring to make his escape from Dr. Longeway's office and get back to the station, and he would have accomplished his purpose but for the importunities of

Burton, the claim agent. Burton says as to this:

“After leaving the doctor’s office we left the building together and started down the street going from there to Central Avenue and then down Central Avenue.” (St. 52.)

“We walked around Central Avenue, walked down the street and then crossed over and went over to our office. When we got to the corner of Central Avenue and Second Street North—the depot is right down Central Avenue a block—we turned to the right and he started on down and I says, ‘You better come up to the office now and see Mr. Foley before you go back.’ So he says, ‘All right,’ and he came up to the office and we went into the office and went upstairs into the office and I turned him over to Mr. Foley.” (Tr. 52-53.)

So it appears from appellant’s own witness that Reid was not in Great Falls for the purpose of making a monetary adjustment of any injuries suffered by the accident. After his treatment by Dr. Longeway, he was endeavoring to get back to the station to take the train to Geyser and was about to start “on down” (to the station) when Burton suggested his going to see Mr. Foley. Burton was sticking about as close to Reid as Reid’s own shadow, and there was no escape, it appears, for the appellee. He had to accede to Mr. Burton’s proposal. Burton says:

“My duty is to take care of the men and see that they get the proper treatment. If the man is in town, that is the time to make a settlement. After he gets out into the country, we have got to spend money to go after him.” (Tr. 58.)

In his benevolent endeavors to see that the men get proper treatment, Mr. Burton, at the time Dr. Longeway examined Reid, was so zealous in his endeavors in the interest of appellee that he said to him:

“Well, are you sure you haven’t any other injuries?” (Tr. 51.)

It must be gathered from the testimony of each of the two claimants and of Dr. Longeway that they never would have permitted the appellee to settle for the sum of \$10 had they entertained the slightest suspicion that he was injured in any other particular than that for which he was treated by the doctor, so that the decision of Judge Rudkin that a mutual mistake was made in effecting the settlement was, at all events, a charitable view of the situation. One might well conclude from the testimony of the claim agents in this case that they had taken a post-graduate course in their vocation among the “settlement workers” engaged in the social uplift among the poor and unfortunate in the great centers of population. It is very apparent that they hurried and hustled Reid through the process of settlement when he was not seeking any or looking for any money adjustment for his physical ails whatever.

This case we think is much stronger than either the *Fowler*, *Lumley* or the *Tatman* cases. In each of those, and particularly the *Fowler* and *Tatman* cases, the apparent injury was the subject of the settlement, and was discussed by the parties. In the *Fowler* case what was thought to be a mere scalp

wound turned out to be a fracture of the skull. In the *Tatman* case what was thought by all parties concerned to be a mere scratch on the surface of the eye turned out to be a wound that penetrated the retina and subsequently caused the loss of the eye. Those cases, it might be argued, involve injuries which were considered by but which proved to be more severe than the parties thought, and that, therefore, their suppositions and speculations were included in and formed a part of the consideration for the release. Notwithstanding that argument it was held that the injuries thought to have been sustained and what really were suffered were different in kind and not merely in degree, and that settlement on the basis of what they were supposed to be was based upon a mutual mistake of fact.

In this case the injury from which developed the hernia on the left side was not felt by appellee nor thought of nor discussed by the physician or the claim agents. All parties to the settlement were wholly and totally oblivious as to any injury of that nature, and its existence was not known to the appellee himself until the following day when his attention was called to it by the pain in that region. In two of the cases cited, the injured one or the releasor, was a person of intelligence and education. In this case we have one of whom the court said:

“Nevertheless the condition of the plaintiff is a pitiable one. He is illiterate and far below the average in intelligence, and if he has sustained injuries not embraced in the compromise set forth

in the complaint he should have his day in court and an opportunity to establish his rights before a jury. I am therefore of opinion that the release is no bar to an action by the plaintiff for any damages sustained by him aside from the injury to his foot which was clearly within the contemplation of the parties when the settlement was made." (Tr. 105.)

Appellee clearly made out a case where it is plain that the release herein would operate as a fraud if appellant was suffered to rely upon it as the impediment of recovery to that part of appellee's damage not discussed or considered and not intended to be released. The decision of the Honorable District Court was right and should be upheld.

Respectfully submitted,

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No. 2896

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Appellant,

VS.

W. J. REID,

Appellee.

Petition for Rehearing

Upon Writ of Error to the United States District Court for the
Eastern District of Washington, Northern Division.

CHARLES S. ALBERT,
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Filed

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United States
Circuit Court of Appeals
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GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

W. J. REID,

Appellee.

Petition for Rehearing

Appellant hereby petitions the court for a rehearing and reargument before the court, and for a reconsideration by the court of this cause, on the grounds that the court fell into manifest error of fact in the decision of said cause, which error of fact appears in the record and materially affects the decision; that the court, as shown by its decision, overlooked an important aspect of the case; that the court erred in its decision; that the judgment which the court has affirmed does not conform to the opinion which the court has rendered.

The court in its opinion says:

"As we have seen, no conceivable fraud has been established. That appellee did receive a shock from being thrown against the sink, resulting in some distress to himself, can scarcely be questioned. At that time he was not afflicted with an inguinal hernia on his left side. The following day he experienced pain in that region of his person, and later the hernia developed so that it became well defined. That he was so afflicted on February 26, 1916, is shown by Dr. Downs, who is corroborated in this by Dr. Longeway and Dr. Marshall. So it appears reasonably clear and certain that the development of this particular trouble began at least about the time of the accident, and that he was then afflicted in a way that was not known to him, and which for that reason was not disclosed to the physician, and consequently not taken into consideration when he settled with the claim agent and gave the release. We think that, under the authorities, there is here sufficient to impeach the settlement in so far as it relates to this phase of the controversy, and to that extent the release should be set aside.

"We agree with the court below that it should not be disturbed as it respects the injury to his foot."

From this it is apparent that the court has found that with the exception of the left inguinal hernia, the release should stand, but as to that it should be set aside.

The decree which the court affirmed was as follows:

"That the release set forth in the complaint herein be and the same is hereby upheld and sustained in so far as it purports to release any and

all claims for damages for injury to the right foot and for injuries to the arm and shoulder.

“IT IS FURTHER CONSIDERED, ADJUDGED AND DECREED, that said release be and the same is hereby canceled, annulled, set aside and held for naught in so far as it purports to release any claim for damages for other injuries complained of and set forth in the complaint herein.”

(Tr. 94).

The injuries claimed in the complaint are as follows:

“That as a direct and proximate result of said car leaving the track and your orator being violently thrown about said car, and said top of said cook-stove falling upon your orator’s foot, your orator has suffered a double inguinal hernia, a broken arch of the right foot, a severe wrench of the back and a severe shock to his nervous system. That since said injuries your orator has suffered great and excruciating physical pains and agony and on account thereof has suffered a semi-paralyzed condition of both legs. And your orator does suffer and in all probability will continue so to suffer during the rest of his natural life.”

(Tr. 4).

Under the decree affirmed, it is possible for the plaintiff to recover for the alleged severe wrench of the back and severe shock to his nervous system, great and excruciating physical pains and agony, and for the alleged semi-paralyzed condition of both legs.

This court has found that there is but one injury for which the plaintiff can recover, to-wit, the left

inguinal hernia. Yet it has affirmed a judgment which will allow recovery for a number of other injuries.

A rehearing should be granted, or at least the judgment of the lower court should be modified to conform to the opinion of this court, and the judgment as rendered should not be affirmed in its present condition. The judgment should be modified under the opinion of the court,—if a rehearing be not granted,—so that it be determined:

“That the release set forth in the complaint herein be, and the same is hereby upheld and sustained, except insofar as it purports to release any claim for damages for the left inguinal hernia, and to that extent it is hereby canceled, annulled, set aside and held for naught.”

We respectfully submit that a rehearing be granted, or that the judgment herein be modified to the extent indicated.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Appellant.

I hereby certify that the foregoing petition for rehearing is in my judgment well founded and is not interposed for delay.

Charles S. Albert
att. for appellant.

